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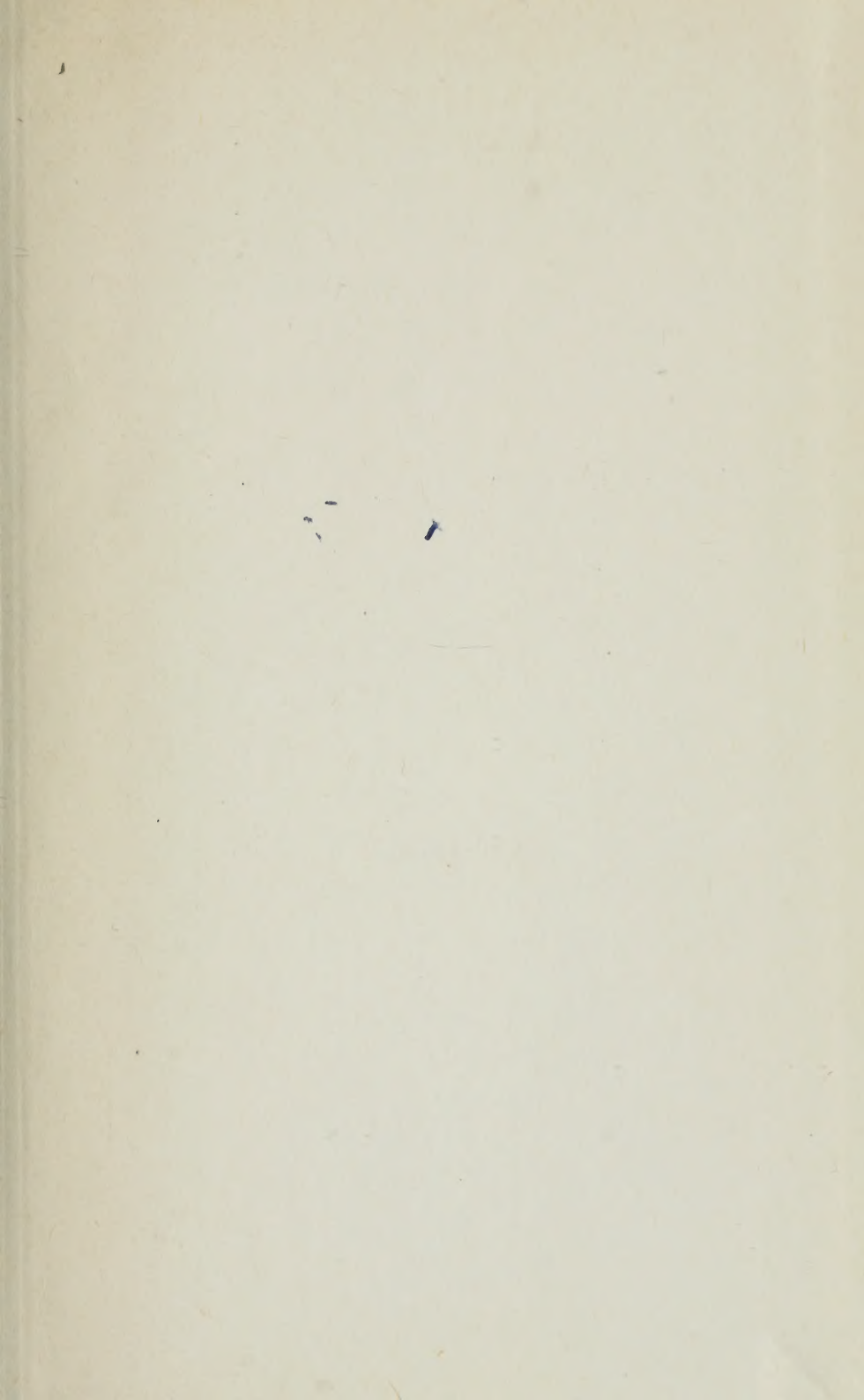
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v. 2433  
No. 11101

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MILWAUKEE MECHANICS' INSURANCE  
COMPANY, a Corporation,

Appellant,

vs.

SILVO QUESTA and JENNIE QUESTA, Hus-  
band and Wife,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Nevada

FILED

OCT 30 1945

PAUL P. O'BRIEN,  
CLERK







No. 11101

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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MILWAUKEE MECHANICS' INSURANCE  
COMPANY, a Corporation,

Appellant,

vs.

SILVO QUESTA and JENNIE QUESTA, Hus-  
band and Wife,

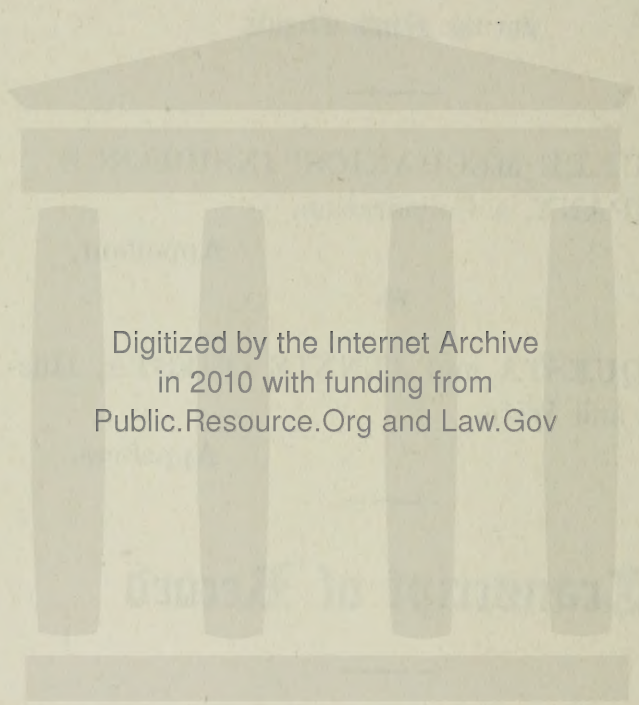
Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Nevada



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

MESSRS. LONG & LEVIT,

Merchants Exchange Building,  
San Francisco, California.

MESSRS. HAWKINS, RHODES & HAWKINS,

153 North Virginia Street,  
Reno, Nevada,

For the Appellant.

WILLIAM S. BOYLE, ESQ.,

Gazette Building,  
Reno, Nevada,

For the Appellee. [1\*]

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\*Page numbering appearing at foot of page of original certified  
Transcript of Record.



In the District Court of the United States  
In and For the District of Nevada

No. 199

SILVO QUESTA and JENNIE QUESTA,  
husband and wife,

Plaintiffs,

vs.

MILWAUKEE MECHANICS' INSURANCE  
COMPANY, a corporation,

Defendant.

### STIPULATION

It is hereby stipulated by and between William S. Boyle, Esq., attorney for Silvo Questa and Jennie Questa, husband and wife, plaintiffs and Long and Levit, attorneys for Milwaukee Mechanics' Insurance Company, a corporation, defendant that plaintiff may file an amended complaint in the above entitled action and serve a copy of the said complaint as amended upon defendant's attorney.

It is further stipulated that the defendant may have ample time to file their answer.

Dated October 26, 1943.

(S) WILLIAM S. BOYLE

Attorney for Plaintiffs

(S) LONG & LEVIT

Attorneys for Defendant.

[Endorsed]: Filed Nov. 1, 1943. [2]

[Title of District Court and Cause.]

## AMENDED COMPLAINT

Come now the plaintiffs after stipulation entered into by attorneys for plaintiff and defendant and file their amended complaint and for cause of action allege:

### I.

That the defendant, Milwaukee Mechanics' Insurance Company, is a corporation duly organized and existing under and by virtue of the State of Wisconsin and licensed to do business within the State of Nevada.

### II.

That the plaintiffs are citizens of the State of Nevada and the defendant is a citizen of the State of Wisconsin; that the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

### III.

That on August 1st, 1941, and for a long time prior thereto and at all times mentioned in this complaint the plaintiffs Silvo Questa and Jennie Questa were husband and wife and ever since have been and now are husband and wife.

### IV.

That on the 1st day of August, A. D. 1941, Silvo Questa for plaintiffs applied to Frank Hassett, Esq., who was then and [3] there the duly authorized agent of the defendant, for insurance in the sum of Seventy-five Hundred Dollars (\$7500.00) against

loss or damage by fire upon a large barn situate on the Glendale Ranch in Washoe County, Nevada, the property of the said plaintiffs, and the defendant by their said agent, in consideration of the premises, which was to be the same rate as all other insurance held by plaintiffs with defendant to be paid defendant by plaintiffs, agreed to insure the plaintiffs on the said large barn on plaintiffs' Glendale Ranch from the 1st day of August, A. D. 1941 for a space of three years and to execute and deliver to plaintiffs within a reasonable and convenient time their policy of insurance therefore in the usual form of policy issued by them insuring said plaintiffs' barn for the sum of Seventy-five Hundred Dollars (\$7500.00) against loss and damage by fire.

#### V.

That thereafter to wit, on about September 20, 1941 the said barn was totally destroyed by fire, whereby the plaintiffs sustained loss to the amount of Seventy-five Hundred Dollars (\$7500.00).

#### VI.

That the defendant neglected and refused and still refuses, to execute and deliver their said policy of insurance in writing to the plaintiffs in pursuance to said agreement.

#### VII.

That the plaintiffs have duly performed all of the conditions of said agreement and insurance on their part to be performed and on or about the 24th day of September, 1941, notified the defendant of said



loss, and on the 8th day of January, A. D. 1942 duly furnished the defendant with proofs of loss.

VIII.

That although more than fifty (50) days have elapsed since said proofs were furnished, no part of said loss has been [4] paid, and the whole thereof remains due and payable to the plaintiffs, the defendant having rejected the said claim in writing.

IX.

That the actual cash value of the property consisting of the barn aforesaid and which was destroyed by fire as aforesaid was on the date of the fire aforesaid in excess of ten thousand dollars.

Wherefore, plaintiffs pray judgment against the defendant.

1. That the defendant corporation deliver its policy of insurance to the plaintiffs in the sum of Seventy-five Hundred Dollars (\$7500.00) on that certain large barn which was situate on the Glendale ranch of plaintiffs.

2. That the plaintiffs are entitled to the sum of Seventy-five Hundred Dollars (\$7500.00) provided for in said policy.

3. That the plaintiffs be given judgment for their costs.

WILLIAM S. BOYLE

Attorney for Plaintiffs.

State of Nevada,  
County of Washoe—ss.

Silvo Questa, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; That he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

### SILVO QUESTA

Subscribed and sworn to before me this 26th day of October, 1943.

[Seal]

WILLIAM S. BOYLE

Notary Public in and for the County of Washoe,  
State of Nevada.

[Endorsed]: Filed Nov. 1, 1943. [5]

---

[Title of District Court and Cause.]

### MOTION TO DISMISS AMENDED COMPLAINT

The defendant moves the Court as follows:

To dismiss the action because the Amended Complaint fails to state a claim against defendant upon which relief can be granted.

LONG & LEVIT

HAWKINS, RHODES &

HAWKINS

By ROBERT Z. HAWKINS

Attorneys for Defendant.

NOTICE OF MOTION

To William S. Boyle, Esq., attorney for plaintiffs,  
204 Gazette Building, Reno, Nevada:

Please take notice that the undersigned will bring the above motion on for hearing before the above-entitled court in the Courtroom of the United States District Court in Carson City, Nevada, on the first subsequent law and motion day hereafter, to wit, on the 7th day of February, 1944, at 10 o'clock [6] in the forenoon of that day, or as soon thereafter as counsel can be heard.

At the time of the hearing the defendant will use and rely upon the following:

The amended Complaint of plaintiff;

The above and foregoing Motion to dismiss the action because the amended Complaint fails to state a claim against defendant upon which relief can be granted, for the reason that the alleged contract is invalid under the statutes of the State of Nevada;

Nevada Compiled Laws, Section 3656.117; Salquist v. Oregon Fire Relief Assn., 197 Pac. 312; and other authorities to the same effect.

Dated this 5th day of January, 1944.

LONG & LEVIT

HAWKINS, RHODES &

HAWKINS

By ROBERT Z. HAWKINS

Attorneys for Defendant.

Service of the above and foregoing Notice of Motion and Motion to dismiss Amended Complaint, by copy, is hereby acknowledged this 5th day of January, 1944.

WILLIAM S. BOYLE

Attorney for Plaintiffs.

[Endorsed]: Filed Jan. 7, 1944. [7]

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[Title of District Court and Cause.]

March 31, 1944

### MINUTES OF COURT

Defendant's motion to dismiss amended complaint having been argued, submitted on briefs and by the Court taken under advisement, It Is Ordered that the motion to dismiss the amended complaint be, and the same hereby is, denied and the defendant is granted 20 days from and after this day within which to answer said amended bill of complaint.

---

[Title of District Court and Cause.]

### ANSWER TO AMENDED COMPLAINT

Now Comes defendant above named, and answers the amended complaint of plaintiffs herein as follows:

#### I.

Defendant denies each and every allegation contained in paragraph IV of said amended complaint,



except that defendant admits that Frank Hassett was a duly authorized agent of defendant during all of the times mentioned in said amended complaint. Defendant alleges that the usual form of policy insuring against fire issued by defendant in the State of Nevada is, and at all times mentioned in said amended complaint was, as prescribed by the "Nevada Insurance Act," Article 15, Section 117, which Act adopts a standard fire policy for use in the State of Nevada. [9]

## II.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V and IX of said amended complaint, and therefore denies said allegations.

## III.

Defendant admits the allegations of paragraph VI of said amended complaint; except that defendant denies that there was any neglect on its part or that its refusal to execute or deliver any policy of insurance to plaintiffs was contrary to said or any agreement.

## IV.

Defendant admits that on or about September 24, 1941, plaintiffs notified defendant that the barn referred to in said amended complaint was burned on or about September 20, 1941; and defendant admits that on January 8, 1942, plaintiffs furnished defendant with a document entitled "Proof of Loss;" defendant denies each and every other al-

legation contained in paragraph VII of said amended complaint.

V.

Defendant admits that it has paid nothing to plaintiffs and has rejected their claim in writing; defendant denies that the whole or any part of said or any loss or any amount whatever remains or is or at any time was due or payable to plaintiffs or either of them; defendant alleges that the elapsed time between the date when said "Proof of Loss" was furnished to defendant on January 8, 1942, and the date of the commencement of this action on February 27, 1942, was and is fifty days.

For a Separate and Affirmative Defense, defendant alleges:

I.

That the usual form of policy insuring against fire [10] issued by defendant in the State of Nevada is, and at all times mentioned in said amended complaint was, as prescribed by the "Nevada Insurance Act," Article 15, Section 117, which Act adopts a standard fire policy for use in the State of Nevada; that it is provided in said standard policy as follows:

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment,

estimate, and satisfactory proof of the loss herein required have been received by the company, including an award by appraisers when appraisal has been required.”

II.

That this action was commenced on February 27, 1942, less than sixty days after plaintiffs furnished to defendant a document purporting to be “Proof of Loss” on January 8, 1942.

Wherefore, defendant prays that plaintiffs take nothing by their amended complaint herein, and that defendant be dismissed hence with its costs of suit herein incurred.

LONG & LEVIT

HAWKINS, RHODES &

HAWKINS

By BERT W. LEVIT

Attorneys for Defendant.

Service of the within Answer to Amended Complaint by copy, is admitted April 24th, 1944.

W. S. BOYLE

Attorney for Plaintiffs. [11]

State of California,

City and County of San Francisco—ss.

Frank E. Chadwick, being first duly sworn, deposes and says:

That he is an officer, to-wit, Second Vice President of Milwaukee Mechanics' Insurance Company, a corporation, the defendant named in the foregoing answer and as such is duly authorized to make this

verification for and in its behalf; that he has read the said answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

FRANK E. CHADWICK

Subscribed and sworn to before me, this 22nd day of April, 1944.

[Seal]

KATHRYN E. STONE

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 25, 1944. [12]

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[Title of District Court and Cause.]

REPLY

Comes now the plaintiff and in reply to separate and affirmative defense plaintiff admits and alleges:

1.

Admits all of paragraph I of defendant's separate and affirmative defense.

2.

Admits all of paragraph II of defendant's separate and affirmative defense.

Plaintiff further replying to defendant's separate and affirmative defense alleges:

That defendants on February 20, 1942, waived the sixty days' time when they denied the existence



of any liability or insurance on their part express or implied on the barn of plaintiffs referred to in their complaint on file, herein by its letter to plaintiff reading as follows:

Law Offices  
Long and Levit  
Merchants Exchange  
San Francisco

February 20, 1942

William S. Boyle, Esq.  
Attorney at Law,  
Gazette Building,  
Reno, Nevada.

Re: File #1552—Silvo Questa,  
Reno, Nevada;  
Fire Loss.

Dear Mr. Boyle:

Please be advised that our client Milwaukee Mechanics' Insurance Company denies that it is under any liability whatever to your clients Silvo Questa and Jennie Questa, or to either of them, for loss by fire to their barn occurring on or about September 21, 1941. Said Insurance Company expressly denies the existence of any contract of insurance, written or oral, between it and your clients or either of them, at the time of said fire or at any other time.

Yours very truly,  
LONG & LEVIT

BWL:MC

Wherefore plaintiffs pray that the prayer of defendant's separate and affirmative defense be denied and that plaintiffs be awarded the relief demanded in their amended complaint.

SILVO QUESTA

Plaintiff

State of Nevada,  
County of Washoe—ss.

Silvo Questa, one of the plaintiffs herein, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; That he has read the foregoing Reply and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

SILVO QUESTA

Subscribed and sworn to before me this 26th day of April, 1944.

[Seal]

WILLIAM S. BOYLE

Notary Public, in and for the County of Washoe,  
State of Nevada.

[Endorsed]: Filed April 27, 1944. [14]

---

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

I am satisfied that the defendant agreed to insure plaintiff's barn in the sum of \$7500.00 subject to

modification of said amount if defendant subsequently appraised the property at a lower figure. Not having made such appraisal, defendant was bound, as if it had issued the policy, to pay the actual loss, not exceeding \$7500.00. I am satisfied from the evidence that the actual amount of loss was the sum of \$4200.00.

Judgment for plaintiff in the sum of \$4200.00 and costs of suit. Findings should be presented in due course.

Dated: February 15, 1945.

LOUIS E. GOODMAN

United States District Judge.

[Endorsed]: Filed Feb. 17, 1945. [15]

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly to be heard before the above-entitled Court on December 4 and 5, 1944, the plaintiffs appearing in person and by their attorney, William S. Boyle, Esq., and the defendant corporation appearing by its attorneys, Long and Levit, by Bert W. Levit, Esq., of San Francisco, and Hawkins, Rhodes and Hawkins, by Robert Z. Hawkins, Esq. The plaintiffs offered evidence both oral and documentary in support of their Complaint, and the defendant corporation offered evidence both oral and documen-

tary in support of its Answer, and both sides rested and the matter was submitted to the Court after Briefs had been filed January 17th, 1945. The Court having been fully advised on all phases of the matter by respective counsel, and now, after due deliberation, the Court finds the following facts:

### I.

That the defendant, Milwaukee Mechanics' Insurance Company is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, and licensed to do business within the State of Nevada.

### II.

That the plaintiffs are citizens of the State of Nevada, [16] and the defendant is a citizen of the State of Wisconsin; That the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

### III.

That on August 1st, 1941, and for a long time prior thereto, and at all times mentioned in this Complaint, the plaintiffs, Silvo Questa and Jennie Questa, were husband and wife and ever since have been and now are husband and wife.

### IV.

That on the 1st day of August, A. D. 1941, Silvo Questa, for plaintiffs, applied to Frank Hassett, Esq., who was then and there the duly authorized agent of the defendant, for insurance in the sum of



Seventy-five Hundred Dollars (\$7,500.00) against loss or damage by fire, subject to modification of said amount if defendant subsequently appraised the property at a lower figure. The plaintiffs applied for insurance as aforesaid upon a large barn situated on the Glendale Ranch in Washoe County, Nevada, the property of the said plaintiffs and the defendant, by their said agent, in consideration of the premises, which was to be the same rate as all other insurance held by plaintiffs with the defendant to be paid defendant by plaintiffs, agreed to insure the plaintiffs on the said large barn on plaintiffs Glendale Ranch from the 1st day of August, A. D. 1941, for a space of three years, and to execute and deliver to plaintiffs within a reasonable and convenient time their policy of insurance therefore in the usual form of policy issued by them insuring said plaintiffs barn for the sum of Seven Thousand Five Hundred Dollars (\$7,500.00) against loss and damage by fire.

#### V.

That thereafter, to-wit, on about September 20, 1941, the said barn was totally destroyed by fire, whereby the plaintiffs sustained loss to the amount of Four Thousand Two Hundred Dollars (\$4,200.00).

#### VI.

That the defendant neglected and refused and still refuses to execute and deliver their said policy of insurance in writing to the plaintiffs in pursuance to said agreement.

## VII.

That the plaintiffs have duly performed all of the conditions of said agreement and insurance on their part to be performed, and on or about the 24th day of September, 1941, notified the defendant of said loss, and on the 8th day of January, A. D. 1942, duly furnished the defendant with proofs of loss.

## VIII.

That although more than fifty (50) days have elapsed since said proofs were furnished, no part of said loss has been paid, and the whole thereof remains due and payable to the plaintiffs, the defendant having rejected the said claim in writing.

## IX.

That the actual cash value of the property, consisting of the barn aforesaid and which was destroyed by fire as aforesaid, was on the date of the fire aforesaid in excess of Ten Thousand Dollars (\$10,000.00).

From the Foregoing Facts the Court Legally Concludes:

That *at* an oral contract of fire insurance upon plaintiffs barn existed which was later destroyed by fire, and that the amount of insurance at that time, covered by such oral contract, was a sum not less than Seven Thousand Five Hundred Dollars (\$7,500.00), which amount the Court concludes to be the amount so covered by such oral contract, and that the defendant not having made the appraisal as set forth in Paragraph IV of these Find-

ings, to the effect that the defendant agreed to insure plaintiffs barn in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), subject to modification of said amount if defendant subsequently appraised the property at a lower figure. Not having made such [18] appraisement, defendant was bound, as if it had issued a policy, to pay the actual loss, not exceeding Seven Thousand Five Hundred Dollars (\$7,500.00). That the damage sustained by Plaintiffs, by reason of said fire, was Four Thousand Two Hundred Dollars (\$4,200.00), together with costs of suit.

That the plaintiffs are entitled to judgment against defendant, Milwaukee Mechanics Insurance Company, a corporation, in the sum of Four Thousand Two Hundred Dollars (\$4,200.00), together with costs of suit.

Done in Open Court This the 5th Day of March,  
A. D. 1945.

(S) LOUIS E. GOODMAN  
District Judge.

[Endorsed]: Filed March 7, 1945. [19]

In the United States District Court  
In and For the District of Nevada

No. 199

SILVO QUESTA and JENNIE QUESTA,  
husband and wife,

Plaintiffs,

vs.

MILWAUKEE MECHANICS INSURANCE  
COMPANY, a corporation,

Defendant.

### JUDGMENT

The above-entitled action coming on regularly to be heard before the above Court on December 4th and 5th, 1944, William S. Boyle, Esq., appearing for plaintiffs, and Long and Levit and Hawkins, Rhodes and Hawkins, by Robert Z. Hawkins, attorneys at law, appearing for defendant corporation, and evidence having been introduced by each of the respective parties, and the said cause having been submitted for decision, and the Court, being fully advised, having rendered its Findings of Fact and Conclusions of Law herein, wherein judgment is ordered in favor of plaintiffs and against the defendant:

Now, therefore, by reason of the law and findings aforesaid:

It Is Ordered, Adjudged and Decreed:

That an oral contract of fire insurance existed upon plaintiffs barn, which was later destroyed by fire, and that the amount of insurance at that time,



covered by such oral contract, was a sum not exceeding Seven Thousand Five Hundred Dollars (\$7,500.00), and that the damage sustained by plaintiffs, by reason of said fire, was not less than Four Thousand Two Hundred Dollars (\$4,200.00). [20]

That the plaintiffs have judgment against defendant, Milwaukee Mechanics Insurance Company, a corporation, in the sum of Four Thousand Two Hundred Dollars (\$4,200.00), with cost of Court herein taxed at \$41.00.

Done in Open Court This the 5th Day of March,  
A. D. 1945.

/s/ LOUIS E. GOODMAN

District Judge

[Endorsed]: Filed March 7, 1945. [21]

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given That Milwaukee Mechanics' Insurance Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on or about March 7, 1945.

LONG & LEVIT

HAWKINS, RHODES &

HAWKINS

By BERT W. LEVIT

Attorneys for Defendant.

Receipt of a copy admitted this 16th day of April, 1945.

/s/ WILLIAM S. BOYLE

Attorney for Plaintiffs.

[Endorsed]: Filed April 28, 1945. [22]

---

[Title of District Court and Cause.]

### SUPERSEDEAS BOND

Know All Men by These Presents:

That we, Milwaukee Mechanics' Insurance Company, a corporation, as Principal, and Commercial Casualty Insurance, a corporation organized and existing under the laws of the State of New Jersey and duly authorized to act as Surety, with its principal office located in the City of Newark, as Surety, are held and firmly bound unto Silvo Questa and Jennie Questa, husband and wife, in the full and just sum of Five Thousand Dollars (\$5,000.00) to be paid to said Silvo Questa and Jennie Questa, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents. [23]

Sealed with our seals and dated this 10th day of April in the year of our Lord One Thousand Nine Hundred and Forty-five.

Whereas, lately at a District Court of the United States for the District of Nevada in a suit pending in said Court, between Silvo Questa and Jennie Questa, husband and wife, as Plaintiffs' and Mil-

Milwaukee Mechanics' Insurance Company, a corporation, as Defendant, a judgment was rendered against the said Milwaukee Mechanics' Insurance Company, and the said Milwaukee Mechanics' Insurance Company having filed or being about to file in said Court a notice of appeal to reverse the judgment in the aforesaid suit, Silvo Questa and Jennie Questa, husband and wife, as Plaintiffs, versus Milwaukee Mechanics' Insurance Company, a corporation, as Defendant, on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Milwaukee Mechanics' Insurance Company shall prosecute its appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award, if Milwaukee Mechanics' Insurance Company fails to make its plea good, then the above obligation to be void; else to remain full force and virtue.

[Seal]

MILWAUKEE MECHANICS'  
INSURANCE COMPANY

By FRED W. SULLIVAN

Vice President

[Seal]

COMMERCIAL CASUALTY  
INSURANCE COMPANY

By D. W. PORTER

Attorney-in-Fact

Form of bond and sufficiency of surety approved

WILLIAM S. BOYLE

Attorney for Plaintiffs.

FRANK H. NORCROSS

District Judge. [24]

State of California,

City and County of San Francisco—ss.

On this 10th day of April in the year One Thousand Nine Hundred and Forty-five before me, James Allen, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared D. W. Porter, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Commercial Casualty Insurance Company (a Corporation) and acknowledged to me that he subscribed the name of said Corporation thereto as surety and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco, the day and year in this certificate first above written.

/s/ JAMES ALLEN

Notary Public In and For the City and County of  
San Francisco, State of California.

My Commission Expires December 21, 1946.

Cas. Bonding 5989-10794

[Endorsed]: Filed April 28, 1945.



[Title of District Coura and Cause.]

APPELLANT'S DESIGNATION OF CON-  
TENTS OF RECORD ON APPEAL

Milwaukee Mechanics' Insurance Company, a corporation, defendant and appellant herein, hereby designates the complete record and all the proceedings and evidence in the above entitled action for inclusion in the record on appeal herein.

Dated: April 11, 1945.

LONG & LEVIT

HAWKINS, RHODES &

HAWKINS

By BERT W. LEVIT

Attorneys for Defendant.

Receipt of a copy admitted this 16th day of April, 1945.

WILLIAM S. BOYLE

Attorney for Plaintiffs.

[Endorsed]: Filed April 28, 1945. [25]

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[Title of District Court and Cause.]

STIPULATION RE TRANSCRIPT AND  
EXHIBITS

It Is Hereby Stipulated that defendant and appellant need not file two copies of the reporter's transcript of the evidence and proceedings at the trial (as required by Rule 75,b, of the Rules of Civil Procedure); one copy thereof shall suffice.

It Is Further Stipulated that, in order to save expense, the Clerk of the District Court need not copy the exhibits introduced or offered at the trial, but may transmit the original exhibits as a part of the record on appeal to the Circuit Court of Appeals.

WILLIAM S. BOYLE

Attorney for Plaintiffs.

LONG & LEVIT

HAWKINS, RHODES &  
HAWKINS

By BERT W. LEVIT

Attorneys for Defendant.

So Ordered:

FRANK H. NORCROSS

District Judge.

[Endorsed]: Filed April 28, 1945. [26]

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[Title of District Court and Cause.]

STIPULATION EXTENDING TIME FOR  
FILING RECORD ON APPEAL

It is hereby stipulated and agreed by and between the above-named plaintiffs and defendant, acting by and through their undersigned attorneys of record, that the time for filing the record on appeal in the above entitled action in the United States Circuit Court of Appeals for the Ninth Circuit be extended to and including July 23, 1945.

/s/ WILLIAM S. BOYLE

Attorney for Plaintiffs

Dated: June 5, 1945.

/s/ ROBERT Z. HAWKINS

for

HAWKINS, RHODES &  
HAWKINS

Attorneys for Defendant

Pursuant to the above Stipulation, and Good Cause Appearing Therefor, it is hereby ordered that the time for filing the record on appeal in the above-entitled action and docketing the action be, and the same hereby is, extended to and including July 23, 1945.

Dated: June 5th, 1945.

/s/ ROGER T. FOLEY

District Judge.

[Endorsed]: Filed June 5, 1945. [27]

In the District Court of the United States,  
In and For the District of Nevada

No. 199

SILVO QUESTA and JENNIE QUESTA,  
husband and wife,

Plaintiffs,

vs.

MILWAUKEE MECHANICS' INSURANCE  
COMPANY, a corporation,

Defendant.

Before: Hon. Louis J. Goodman,  
Judge.

### TRIAL

Be It Remembered, That the above-entitled matter came on regularly for hearing before the court, sitting without a jury, on Monday, the 4th day of December, 1944, at Reno, Nevada, Hon. Louis J. Goodman, Judge, presiding.

#### Appearances:

Wm. S. Boyle, Esq.,

Attorney for Plaintiffs.

Long & Levit, by Bert W. Levit, Esq.

Hawkins, Rhodes & Hawkins, Esq., by Robert  
Ziemer Hawkins, Esq.,

Attorneys for Defendant.

The following proceedings were had:

The Court: Do you want to make a statement,  
Mr. Boyle?

Mr. Boyle: Yes, your Honor. This is a case, the



plaintiffs are Silvo Questa and Jennie Questa, husband and wife, vs. Milwaukee Mechanics' Insurance Company, and the case is predicated upon the action that the defendant corporation deliver [30] a policy of insurance to the plaintiffs in the sum of \$7500, which was on a certain large barn out on their ranch and also that the plaintiffs are entitled to the sum of \$7500 provided for in said policy, which they allege was to be delivered to them by Mr. Hassett, a representative of the Milwaukee Mechanics' Insurance Company.

Now the plaintiffs will prove that the controversy exceeds three thousand dollars and that the plaintiffs are citizens of the State of Nevada and the defendant is a citizen of the State of Wisconsin. That about August 1, 1941, and for a long time prior thereto, that Silvo Questa and Jennie Questa were husband and wife, and on the 1st day of August, 1941, Silvo Questa, for plaintiffs, applied to Frank Hassett, who was then and there the duly authorized agent of the defendant, for insurance in the sum of \$7500 against loss or damage by fire upon a large barn situate on the Glendale Ranch in Washoe County, Nevada, the property of the said plaintiffs, and that the defendant, by their agent, in consideration of the premises, which was to be the same rate as all other insurance held by the plaintiffs with defendant, to be paid defendant by plaintiffs, agreed to insure the plaintiffs on said large barn on the plaintiffs' Glendale Ranch from the 1st day of August, 1941, for a space of three years, and to

execute and deliver to the plaintiffs, within a reasonable and convenient time their policy of insurance therefor in the usual form of policy issued by them insuring plaintiffs' barn for the sum of \$7500. Now in that respect we will state that we will prove that Mr. Hassett was the insurance agent who transacted all the business of Silvo Questa and Jennie Questa, as far as insurance was concerned, and they had an agreement between them that all that was necessary for Mr. Questa to do was to call up Mr. Hassett and tell him that they had something they wanted to insure. Now it may be an automobile or it may be a barn, or it may be some hay, or may be some onions, may be anything on a ranch and Mr. Hassett then, as agent for the company, would go down there to the ranch and it was understood that Mr. Hassett would insure it, that he would then insure the matter and present to him the amount that he insured it for and if it was too little they would argue it and they would raise it. If it were too much, they would argue it again and they would lower it, until they reached the value which they believed it was worth, and that is the insurance that should be placed upon the barn. That thereafter Mr. Hassett agreed to insure the barn in the manner which I have explained and he failed to deliver the policy to Mr. Questa and that on the 20th day of September, 1941, said barn was totally destroyed by fire, whereby the plaintiffs sustained a loss in the amount of \$7500. Now, your Honor, we maintain and will prove, plaintiffs will prove, that the value of the barn at the time it burned was between

10 and 15 thousand dollars and that the plaintiffs have performed all the conditions of their agreement, but the defendant refuses, and still refuses, to deliver the policy, and more than 50 days have elapsed, etc., since the notice of loss. Milwaukee Mechanics' [32] Insurance Company was served with a notice of loss, but as alleged in here, more than 50 days have elapsed since said proofs were furnished and no part of said loss has been paid and the whole thereof remains due and payable to the plaintiffs, the defendants having rejected the said claim in writing, and irrespective of that, your Honor—it is not the proper time for argument, but I might state—inasmuch as plaintiffs are asking for delivery of policy, the plaintiffs can not very well be bound by the policy that was not delivered to them, even though the State law might require that policy of insurance be in writing, according to the general laws that have been adopted now throughout this country, that policies of insurance must be in writing; but, however, I maintain that if you don't deliver a policy that you are not bound by the terms of a policy that is not delivered to you, and our action is predicated upon the delivery of that policy of insurance in the usual form of the Milwaukee Mechanics' Insurance Company and that the amount of damage suffered as a result of not delivering it was \$7500, and that is the amount we will prove the barn was worth at the time of the fire.

The Court: Are you relying on the policy of insurance or are you relying upon the agreement?

Mr. Boyle: Well, we are relying upon the insurance. We are relying upon the usual form of policy that the company makes out. We are relying upon that.

The Court: I gather from what you say that cause of [33] complaint is that you didn't get the policy.

Mr. Boyle: We did not get the policy.

The Court: And if you had got the policy you would have the insurance?

Mr. Boyle: We would have had the insurance.

The Court: And then under the terms of the policy you would be entitled to collect because you had a loss?

Mr. Boyle: Exactly; and we maintain, according to the authorities when you sue in an action of this kind, you sue both for delivery of policy and damage suffered and by virtue thereof both may be joined together and tried at the same time.

The Court: I haven't read the decision. I understand this is the second trial.

Mr. Boyle: This is the second trial of this action, your Honor. The decision of the Circuit Court of Appeals reversed the lower court when Judge Norcross had given a judgment for the sum of four thousand dollars to the plaintiffs.

The Court: Is there any question of fact that is going to be disputed at this trial, other than the amount of loss?

Mr. Boyle: When we started the action, we thought we would go to trial and consider it on the same premises as we did the first trial, but for some



reason or other we were deluged by a great many motions and demurrers, etc.

The Court: I mean by that, witnesses that have testified [34] at the previous trial with reference to the agreement, etc., are not going to come here and testify to different facts than they had there?

Mr. Boyle: I do not think they will.

The Court: That is why we are asking the question. Is it necessary to take the testimony of witnesses over again?

Mr. Boyle: I think it will be, yes. We have additional witnesses. We have at least four other witnesses that will testify as to various matters that came up even since that trial, certain matters that were raised by the defendant.

The Court: Was there any conflict in the testimony at the first trial?

Mr. Boyle: Plenty of it.

The Court: As to whether there was this agreement of insurance?

Mr. Boyle: Oh, by all means.

The Court: Then, of course, the Court will have to hear their testimony. I thought the case would now result in the question of the law of the Circuit Court decision.

Mr. Levit: May I make a brief statement at this time. So far as the complaint is concerned, and of course the complaint is the basis on which we seek to try the case, this is a suit upon an oral contract of insurance. Paragraph IV is the charging paragraph of the complaint and it is very clear. I am

[35] going to read it. Paragraphs I, II, and III are merely preliminary, in regard to jurisdiction, etc. Paragraph IV reads:

“That on the 1st day of August, A. D. 1941, Silvo Questa for plaintiffs applied to Frank Hassett, Esq., who was then and there the duly authorized agent of the defendant, for insurance in the sum of Seventy-five Hundred Dollars (\$7500.00) against loss or damage by fire upon a large barn situate on the Glendale Ranch in Washoe County, Nevada, the property of the said plaintiffs, and the defendant by their said agent, in consideration of the premises, which was to be the same rate as all other insurance held by plaintiffs with defendant to be paid defendant by plaintiffs, agreed to insure the plaintiffs on the said large barn on plaintiffs' Glendale Ranch from the 1st day of August, A. D. 1941 for a space of three years and to execute and deliver to plaintiffs within a reasonable and convenient time their policy of insurance therefor in the usual form of policy issued by the \* \* \* \* ” etc.

In other words, your Honor, there is a specific allegation of an agreement to insure at a specific amount in a specific form for a specific time, made by the mutual agreement between the parties, and this suit is obviously a suit on that policy, that oral contract of insurance, because no written contract was ever issued. Now the issue is made, of course, on that paragraph. We admit the agency of Mr. Hassett, who is mentioned in the paragraph, [36] and we deny all of the other allegations in the para-

graph; that is, we deny the agreement. Now the only other important allegation——

The Court: That is, if the evidence would sustain the plaintiffs' contention that the agreement was made, then that would end the matter, except for the amount of damages?

Mr. Levit: That is corret, your Honor. In other words, the first question is, was or was there not an oral contract of insurance? Now the other issue in the case, the other and primary issue in the case, is the question, if there was such a contract of insurance, what, if any, was the amount of loss and damage.

The Court: Then we can limit this just to the testimony on those two issues, can we not?

Mr. Levit: I think factually those are the only issues.

The Court: Will you agree to that, Mr. Boyle?

Mr. Boyle: I will agree to anything that will expedite it; at the same time, there are many things that have come up since the last hearing in the Circuit Court of Appeals that have been raised and we do not want to leave those unanswered at this time, so the record will show those in the event they are raised again. We would like to clear those matters up. There are various things, such as value of the barn at the date of the fire. We maintain, and had witnesses at the time of the last hearing, whom I believe are present and have important testimony [37] as to the replacement value of the barn and Mr. Levit raised considerable objection to that on the ground that the findings should show the value

of the barn on the day it was burned, so those are the things we are trying to obviate this time by bringing up all the matters which he objected to and clearing up any loopholes that might remain.

The Court: Of course that matter you refer to is part of the question of value of the property at the time of the loss.

Mr. Boyle: That is it.

The Court: I think we have that cleared up. You may go ahead and put on your evidence.

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### SILVO QUESTA,

being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Boyle:

Q. What is your name please?

A. Silvo Questa.

Q. Where do you reside?

A. R. F. D. 2, Box 102, Reno, Nevada.

Q. How long have you lived there?

A. Since 1919.

Q. Are you a citizen of Nevada?

A. Yes sir.

Q. Do you know, of your own knowledge, where the defendant is a citizen of?      A. Wisconsin.

Q. Who is Jennie Questa? [38]

A. My wife.

Q. Were you husband and wife during August, 1941?      A. Yes sir.



(Testimony of Silvo Questa.)

Q. What, to your recollection, occurred on the first day of August, 1941, if you remember, pertaining—

A. (Interrupting): I applied to Frank Hassett, who was agent for the Milwaukee Mechanics' Insurance Company, for insurance of \$7500. against loss or damage by fire on a large barn situated at the Glendale Ranch in Washoe County, Reno, Nevada, belonging to me and my wife.

Q. Do you know Frank Hassett? A. Yes.

Q. How well do you know him?

A. I am very well acquainted with Mr. Hassett. He is my insurance agent. He insures anything I desire to insure.

Q. Just a second. You say that he insures anything that you desire to be insured. Have you any agreement with him relating to your insurance?

A. Yes.

Q. Is it in writing or not? A. No.

Q. What agreement have you between you and him pertaining to insurance?

Mr. Levit: If the Court please, I am going to object to the question on the ground it does not appear to be relevant to any issue in the case. In the first place, there is no showing [39] when the agreement was made. For all that appears, it might be an agreement subsequent to the time mentioned, August 1, 1941, because Mr. Questa has testified that Mr. Hassett is his insurance agent and handles all his insurance; and in the second place, the agreement with which we are concerned here is a specific

(Testimony of Silvo Questa.)

definite agreement alleged to have been made on August 1, 1941, and therefore we object to this testimony.

The Court: Counsel, why do you have to show anything more than the particular agreement?

Mr. Boyle: May it please the Court, I could produce authorities, and I think at the time of argument we will produce them, to the effect that where a man has been dealing in insurance, the conditions are altogether different, just casually walking up to a man and saying, "I want you to insure my barn, write my insurance up", to where you have been transacting business with a man. With an insurance man or agent a different condition exists.

The Court: Do you have to go into that in order to prove the particular agreement? I do not suppose these gentlemen would raise any point that this Mr. Hassett wrote insurance for the plaintiff. What do you hope to gain by that?

Mr. Boyle: We want to show the relationship of agent that exists between them and what that relationship was and how far it extended.

The Court: You mean you are going to try to show that there [40] was no specific direction to write this particular insurance, but just the agent had authority to put on any amount of insurance?

Mr. Boyle: No, I am endeavoring to bring out the relationship that existed between Mr. Questa and Mr. Hassett a long time previous to this insurance.

(Testimony of Silvo Questa.)

The Court: Do we have to go over all of that? Is there any issue on that?

Mr. Boyle: There was issue on everything all during this trial. That is why it took about 4 days to try it.

The Court: Did counsel for the defendant have any point in mind? What difference does it make whether he was his agent for a long time or not?

Mr. Boyle: They deny any relationship existing and they deny the contract and we desire——

The Court: I understand they deny the particular agreement in this case, but it may not follow from that they deny there has been a general relationship of insurance agent and principal between the witness and this Mr. Hassett.

Mr. Levit: Your Honor, I would like to say that we interposed objection to a specific question. We are not going to object to specific deals between Mr. Questa and Mr. Hassett prior to the making of this purported agreeemnt, if counsel wishes to bring those out. That was not the question that was asked before. [41]

The Court: Yes, I know the question asked was whether or not there was an agreement. I will sustain the objection to that question. I would like to have this case move along a little more rapidly.

Q. (By the Court): Was this man your insurance agent for a long time? A. Yes sir.

Q. (By the Court): He wrote a lot of your insurance for a long time? A. Yes.

(Testimony of Silvo Questa.)

Mr. Boyle: That is the point I wanted to bring out. I also wanted to bring out the manner in which they transacted their business, how they came to closing up insurance.

The Court: Ask the next question. I don't know what you have in mind.

Q. Now with relation to Mr. Hassett as to your insurance agent, how do you usually carry on your insurance business, explain to the Court?

Mr. Levit: We object unless it is limited to the date prior to the conversation.

The Court: I will sustain the objection to the extent counsel stated, limiting it to the time prior to the agreement in question.

Q. All right, that is what we intended anyway.

A. Mr. Hassett and I had agreed that he would write all my insurance, [42] not once, but many times. It was agreed that all I had to do was to call him up or call on him and he would insure anything I desired. We had an understanding that he would go to the ranch and insure it and if it was too little, we would raise it; if it was too high, we would lower it, and so on until we struck the right value.

Mr. Boyle: That was merely to explain, your Honor, the manner in which they carried on their business.

The Court: All right.

Q. Now with relation to the insurance that you mentioned on October 1, 1941, where did you meet



(Testimony of Silvo Questa.)

Frank Hassett, the agent, if you met him, at that time?      A. August 1st?

Q. Yes, on August 1st.

A. I met him on the street, on Virginia Street.

Q. Did you have any conversation with him at that time when you met him?      A. Yes.

Q. Who was present?

A. Mr. Hassett and myself.

Q. Do you remember the exact meeting place at that time?

A. On Virginia Street near Colbrandt's.

Q. What time was it?

A. Between 11:30 and 12:00 o'clock.

Q. What, if anything, was said, if you recollect?

A. I asked in regard to insuring the barn for three years for [43] \$7500. in the usual form with the usual policy issued to me on other property.

Q. Do you remember any other conversation at that time?

A. I called his attention, referring to Brown Motors Company, that I had purchased a station wagon, International, if he had insured the car. He said that he had insured the car.

Q. What further occurred, if you recollect?

A. Mr. Hassett assured me that he would insure the barn and that he would come down to the ranch and see the barn, as I believed it should carry the full insurance of \$7500. Mr. Hassett agreed he would insure it for \$7500 and he would deliver me the policy with the policy for the car.

Q. Did Mr. Hassett go to the ranch?



(Testimony of Silvo Questa.)

A. Yes, he went to the ranch in my absence and talked to my wife.

Q. Now, to your knowledge, did he see the barn?

A. He couldn't help but see the barn.

Q. Now what, if anything, was done about insurance at that visit of Mr. Hassett's?

A. He spoke to my wife and visited my home and then left.

Mr. Levit: We move that be stricken as hearsay.

The Court: He can testify to anything that was said.

Mr. Levit: He wasn't present, I believe, your Honor.

Q. Now when did you hear from Mr. Hassett, if you ever did, again?

A. I met him on the street, on Virginia Street, along about [44] one o'clock in the middle of August, and I again asked him about the insurance policy. He said that he would take care of it.

Q. Did you see him any time thereafter?

A. I met him at the Riverside bar along about 7:30 in the evening along about the last part of August or the first part of September, 1941.

Q. Did you speak to him? A. Yes.

Q. And was he alone or with other people?

A. He was sitting down with some people and as I walked by I asked him about the policy.

Q. What, if anything, did he say?

A. He said that he would take care of it and that he would come down.

(Testimony of Silvo Questa.)

Q. What, if anything, occurred, if you recollect, after meeting Mr. Hassett at the Riverside bar?

A. On September 20, 1941, the barn burned down, was completely destroyed.

Q. After the barn burned down, did you see Mr. Hassett or communicate with him?

A. Yes.

Q. Where?

A. In his office in the Heitman Building, Reno.

Q. Who were present?

A. Mr. Hassett and myself.

Q. What time was it? [45]

A. It was early in the afternoon, about four days after the fire, for I expected Mr. Hassett to show up at the ranch.

Q. What was the conversation had between you and Mr. Hassett, if you recollect?

A. I asked Mr. Hassett if he had my policy of insurance on the barn. I told him that the barn had burned down. Mr. Hassett said for me not to worry, that it was his worry from then on and then he put his hand to his head and said, "Oh, Jesus, it is all my fault. Don't you worry; let me do the worrying. I have been so busy running back and forth to Las Vegas, Nevada."

Q. Did you have any other business with him thereafter?

A. Yes.

Q. What?

A. I insured a box stall barn and little saddle room and called his attention to the stone house, supposed to be insured for four thousand dollars at the same time the barn was insured.

(Testimony of Silvo Questa.)

Q. Did he deliver the policies? A. Yes.

Q. After he delivered the last policies, what, if anything, occurred about the barn?

A. I insured some onions with Mr. Hassett after the barn burned.

Q. Did Mr. Hassett mention the barn insurance thereafter? A. Yes.

Q. When?

A. After New Years, 1942. [46]

Q. Where? A. At his office.

Q. What did he say or what was said?

A. He said that he had talked to his boss and his boss said there was no insurance.

Q. What, if anything, further was said at that time?

A. I says, "Frank, if you think you are going to pull that over on me, you are badly mistaken." I told him I would advertise him, that he had no business doing business in Nevada, he belonged in California. Mr. Hassett said then that he would take me to California and pay all my expenses if I would go with him and talk to his boss.

Q. Did you see Mr. Hassett after that occasion?

A. Yes.

Q. When?

A. On the 26th day of January.

Q. Did you have any conversation with Mr. Hassett at that time?

A. Yes, he said for me to be patient for three days.

(Testimony of Silvo Questa.)

Q. Did you hear from him further?

A. Yes, I met him after the last of January and he said that he had talked to his company and told them to charge it up to advertising and to pay me and he said also in twenty-five years that he had been with the company that he had learned something. He said, "Hereafter when I get an order, I will write it down and if I have to get on the witness stand, I will admit it was [47] an order."

Q. Mr. Questa, I show you a certain small picture and ask you if you recollect that picture and what it is?

A. It is the barn.

Q. And there is also a young lady on a horse, do you know who the young lady is?

A. No, I do not.

Q. Now that is the same one, this picture, showing an enlargement?

A. Yes sir.

Q. It is a true and exact picture of the barn?

A. That is right.

Mr. Boyle: I would like to offer this in evidence.

Mr. Levit: No objection.

The Court: Let it be marked Plaintiff's Exhibit 1.

Q. Now you testified that the smaller picture was a snapshot and the larger one was an enlargement?

A. Yes sir.

Q. Were you familiar with the construction of the barn?

A. Yes sir.

Q. Will you kindly describe it?

A. Well, it was a large barn. It was an old barn,

(Testimony of Silvo Questa.)

built with 10 x 10 and 12 x 12 timbers, all iron braced, grooved and pinned, was in excellent condition, built from big timbers from the mills of Virginia City.

Q. How long have you been in the ranching business? [48] A. All my life.

Q. During your life how many ranches have you lived on? A. Three.

Q. Are you familiar with barns?

A. Yes sir.

Q. Have you ever built barns or had them built for you?

A. I have been around where they built barns.

Q. Have you made a study of barns?

A. Well, I am not a contractor or carpenter either.

Q. What particular value is a barn to a ranch?

A. It is a big value to a ranch.

Mr. Levit: We object and move that the answer be stricken.

The Court: Well, you don't have to waste time on that, I do not believe.

Mr. Boyle: Your Honor, it is important to this degree. You will find the authorities agree with relation to farm lots and acreages, the best testimony you can get on such things is a rancher or a farmer who understands the business of farming and who knows those things and has his own peculiar way of placing a value on it.

The Court: The only question here is how much it is worth.



(Testimony of Silvo Questa.)

Q. Mr. Questa, I asked you the question if you were familiar with barns. Now, were you familiar with that barn on your ranch down on the Glendale Road, known as the Glendale Ranch? A. Yes.

Q. On the morning of the fire and previous thereto? [49] A. Yes.

Q. Have you in mind an opinion as to the value of that barn? A. Yes.

Mr. Levit: As of what time?

Mr. Boyle: I said the morning of the fire and previous thereto.

Q. What would be your opinion of the value of that barn?

A. Fifteen thousand dollars at that time.

Q. (Mr. Levit): At the time of the fire?

A. Yes sir.

Q. (By the Court): How large was this barn?

A. It was over 100 feet long, about 50 or so wide, I can't say the exact feet, and very high, very large. It was known as the largest barn in this county.

Q. (By the Court): What sort of a floor did it have?

A. We had taken the floor out to put cement pillars under, piers.

Q. (Mr. Boyle): I will show you some plans and apparently there are three attached here. This would be apparently the front elevation, would it not?

Mr. Levit: Just a minute before you answer, I want to make an objection.

(Testimony of Silvo Questa.)

Q. Well, I will show you some plans and ask you if you are familiar with those? A. Yes.

Q. You are familiar with them? ([50])

A. Yes sir.

Mr. Boyle: I will offer them for identification, your Honor.

Mr. Levit: No objection if marked for identification.

The Court: Are these supposed to be plans?

Mr. Boyle: Yes, but I want to get the man that drew them.

The Court: Let the plans be marked Plaintiffs' 2 for identification.

Mr. Levit: Your Honor understands that we do not stipulate those are the plans of the barn. They have not yet been identified, just marked for identification.

The Court: Counsel said he will have a witness who will testify to them.

Q. Of your own knowledge, Mr. Questa, without looking at those plans or testifying pertaining to the plans, could you give the dimensions of the barn and give the Court a description as to its height and other qualifications of the barn, if you know?

A. Well, I should judge it was over 100 feet long, I will say 110 or 115 feet long, 50 feet wide, and very high, more than two stories high and then the roof.

Q. Now what, to your knowledge, would be the capacity of that barn with relation to storing hay? How much hay could you put in it?

(Testimony of Silvo Questa.)

A. Well, hundreds of hundreds of tons, besides implements.

Q. And besides hay did you store other things pertaining to the ranch, such as implements? [51]

A. Yes, harness and collars, lots of things.

Q. Now when you spoke to Mr. Hassett about the insurance, did you discuss the premium?

A. We had both talked about it, being with the same company that he insured the house on the ranch, under the same conditions set forth in those policies issued by the Milwaukee Mechanics' Insurance Company. It was customary for Mr. Hassett to prepare the policy and I would accept it, so I relied upon it.

Q. Were you in a position to pay the insurance premium at all times during this transaction?

A. Yes, Mr. Hassett knew that.

Mr. Boyle: You may cross-examine.

### Cross-Examination

By Mr. Levit:

Q. Mr. Questa, you purchased an automobile from Brown Motors, did you not, about the 25th of July? A. Yes.

Q. And I believe you said in your first conversation with Mr. Hassett on August 1st that this automobile was also a subject of discussion?

A. Mr. Hassett had called up the ranch a few days after I had purchased the station wagon and asked me if I would let him have all the insurance on the station wagon, for me to call up Brown Mo-

(Testimony of Silvo Questa.)

tors and tell Brown Motors to give Frank Hassett all the insurance on the car. [52]

Q. I don't think you understood my question. I am asking if it is not a fact that on direct examination you testified that at that conservation on August 1st you discussed with Mr. Hassett the matter of insurance on this station wagon?

A. I asked him if he had insured the car.

Q. Yes. Now you told us on that occasion you discussed also insurance on the stone house?

A. Yes sir.

Q. That is correct, is it? A. Yes sir.

Q. And on the barn; so you discussed those three things at the same time? A. Yes sir.

Q. Now what about the amount of insurance on the stone house, did you discuss that?

A. Four thousand dollars.

Q. Did you tell Mr. Hassett that was what you wanted on the stone house? A. Yes sir.

Q. What did Mr. Hassett say?

A. Said he would insure it; he would take care of it.

Q. Now you said that you had had other dealings in connection with fire insurance with Mr. Hassett prior to this date. A. Yes sir.

Q. How many other fire insurance policies had Mr. Hassett issued for you? [53]

A. He had insured the new house at the ranch in the spring.

Q. Now, Mr. Questa, I show you a policy of insurance in the Milwaukee Mechanics' Insurance

(Testimony of Silvo Questa.)

Company, in amount of seven thousand dollars and dated April 16, 1941, and I ask you if that is the policy that you refer to when you say Mr. Hassett insured the new house on the property?

A. What policy is this for, the amount? This is the policy for the new house?

Q. Well, do you recognize the policy? You stated that you had received a policy on the new house from Mr. Hassett, is that the policy?

A. What do you mean, I received a policy when?

Q. Well, I don't know. I thought you had had other insurance transactions with Mr. Hassett and had received policies from him.

A. Yes, the new house policy.

Q. Is that the policy?           A. Yes, it is.

Mr. Levit: We offer that in evidence and ask it be marked Defendant's A.

Witness: Just a moment. Let me look this over. It was issued in March, wasn't it?

Mr. Levit: It appears to be.

A. Yes, that is right.

The Court: Let the policy be marked Defendant's Exhibit A.

Q. What other fire insurance policies had you received from [54] Mr. Hassett prior to this time, prior to August 1, 1941?

A. I hadn't received any yet.

Q. You hadn't received any yet?

A. He had insured the new house but the policy hadn't come as I know of.



(Testimony of Silvo Questa.)

Q. You mean you hadn't received this policy for the new house prior to the fire?

A. Oh yes, prior to the fire.

Q. I am sorry, I mean prior to August 1st.

A. Before August 1st?

Q. Yes. A. No, we hadn't received it.

Q. When did you receive this policy, this Defendant's Exhibit "A"?

A. My wife received that policy that I know of.

Q. And your testimony now is that that was received after the conversation on August 1st, is that correct? A. Yes sir.

Q. So that there must then, if you speak of an agreement whereby Mr. Hassett would come to the ranch and decide on the amount of insurance that would be put on a building, etc., there must have been other policies which you had had that kind of a transaction before August 1st. What were they?

A. He was at the ranch to see the new house while it was being built.

Q. You are speaking of the policy we just introduced in evidence? [55]

A. Yes. The policy was first talked about six thousand and when he came to the ranch we raised the policy to seven thousand.

Q. But you didn't receive that prior to August 1st? A. Before August 1st, no.

Q. Now what other policies did you receive from Mr. Hassett, or what policies of insurance did you receive from Mr. Hassett prior to August 1st?

(Testimony of Silvo Questa.)

A. Didn't receive any policy before August 1st. He hadn't sent them.

Q. Didn't you testify that Mr. Hassett had handled a great deal of insurance business for you and it was your custom that you were to have a certain course of dealing and then as a result of that Mr. Hassett would issue the policy and that is why you spoke of the usual form when you had this conversation?

A. Yes, we had that conversation on August 1st.

Q. Which conversation?

A. Our agreement.

Q. But actually then your testimony now is that prior to August 1st there had been no other insurance policy actually issued by Mr. Hassett to you?

A. There was the policy for the station wagon, but I hadn't received that yet.

Q. The station wagon was only purchased on July 25th, wasn't it? A. That is right. [56]

Q. And Mr. Hassett had not received all the insurance on that from Brown Motors Company?

A. A couple of days after it was bought, next day.

Q. So that your conversation with Mr. Hassett took place three or four days after the purchase of the station wagon? A. On the street.

Q. That is correct. Now what other insurance transactions, outside of the insurance on the new house, which resulted in the issuance of Defendant's Exhibit "A", this policy, did you have *have* with

(Testimony of Silvo Questa.)

Mr. Hassett prior to August 1st and other than the automobile insurance?

A. I had the conversation with him about insurance and about the new house in the spring.

The Court: He wants to know what other policies of insurance you have beside the one in evidence.

A. The new house policy and the station wagon policy.

Q. Now as a matter of fact, Mr. Hassett was down to look over the property before the issuance of this policy, wasn't he?      A. What policy?

Q. The issuance of this policy on the new house.

A. No, we had called up Mr. Hassett on the telephone, Mr. Yori and I called him up for the new house——

Mr. Boyle: Just a second. Was Mr. Yori an agent of this company?      A. No.

Q. Where does Mr. Yori enter into the picture?

A. Well, I was over on Commercial Row getting some help while we were building this new house in the spring, some ranch hands, and we started talking about insurance and he said, "Are you going to carry insurance?" I said, "Yes", and he mentioned Frank Hassett. I said I knew him very well and we called up and insured the new house that was being built for \$6500 and when Mr. Hassett came down later——

Q. When?      A. In the spring, March.

Q. Of 1941?      A. Of 1941.

(Testimony of Silvo Questa.)

Q. Then he came down to your house shortly after this conversation with him, didn't he? I mean, he came down to the ranch to look at the house?

A. Yes, he came down to the ranch to look at the new house.

Q. Do you know, Mr. Questa, whether or not Mr. Hassett issued a written binder or cover note on this new house before the issuance of the policy?

A. No, I never did receive one.

Q. But you are familiar with the insurance practice, and with Mr. Hassett's practice of issuing cover notes, binders, when insurance is bound?

A. I never did receive a cover note.

Q. Isn't it a fact on this onion insurance that you spoke about you received a number of cover notes from Mr. Hassett?

A. I received a cover note for the onions. [58]

Q. So that you are familiar with the nature of the issuance of a cover note for binding insurance, are you not?

A. I know now but I didn't then. I never heard of a cover note before the first trial.

Q. You may not have heard of that form of note, but you knew when Mr. Hassett bound insurance for you and did not issue the policy for some time afterwards, that it was his custom to issue a cover note or written memorandum of the insurance?

A. I don't know because I never did receive a cover note, only on those onions.

Q. You knew also, did you not, that Mr. Hassett,



(Testimony of Silvo Questa.)

and insurance agents generally, do not insure property unless they take a look at it first?

Mr. Boyle: Objected to as calling for conclusion of the witness. This man does not know what another man would do.

The Court: I think it is entirely beyond the limits of cross-examination, but I will overrule it. You may answer.

(Question read)

A. He told me any time I wanted any insurance he would take care of it and if it was too much, we would fix it, or if it was too little, we would fix it.

Q. Now, in order to refresh your recollection, Mr. Questa, I am going to ask you if you do not recall making the following answer in response to this question in your testimony at the first trial of this action, referring to page 70 of the printed [59] transcript: "Didn't you say just a moment ago the reason you wanted him to come down and see the barn was that you wanted more insurance than that and you thought if he saw it you could get more insurance?" and your answer: "Well, as far as I know, they all take a look at buildings before they insure and what I know about insurance is if you don't carry enough, the insurance company won't stand for that and if you insure for too much, why it is just too bad." Do you recall so testifying?

A. Yes.

Q. Isn't it a fact that it is quite within your knowledge, and was at the time you had the first



(Testimony of Silvo Questa.)

conversation with Mr. Hassett concerning this insurance, that before Mr. Hassett would bind the insurance or would write the policy, he would come down and look at the property?

A. No, when I put in an order, it was covered.

Q. Isn't it a fact, Mr. Questa, that Mr. Hassett specifically asked you, on the occasion of your first conversation with him, whether you wished him to hold the property covered pending the time that he could come down to the ranch and you replied that you did not wish him to do so?

A. I don't remember that.

Q. But you don't deny it, do you?

A. Yes, I do.

Q. You are quite sure that no such conversation occurred?

A. I am quite sure.

Q. Now how do you fix the date of this first conversation with Mr. Hassett?

A. Because it was right along when I bought the station wagon; it was right a few days after that I met him on the street.

Q. Now do you recall that when you testified at the first trial that you said, and I am referring to page 62 of the transcript: "Q. Are you sure that your first conversation with Mr. Hassett about insurance on the barn took place after you purchased the station wagon?" and your answer was: "I can't remember." Do you recall so testifying?

A. No, I do not.

Mr. Levit: Will counsel stipulate that that was his testimony?

(Testimony of Silvo Questa.)

Mr. Boyle: No. Just a second, let me read it. You first said, "You are sure that your first conversation with Mr. Hassett concerning the insurance on the barn, was after you purchased the station wagon?" The answer was, "I had talked to Mr. Hassett before that." "Q. About insurance on the barn?" "A. No, not about insurance on the barn." I presume that is what you are trying to read now? That is page 62.

Mr. Levit: Then read the following question and answer, that is what I read.

Mr. Boyle: (Reads) "Then I will repeat my question—are you sure that your first conversation with Mr. Hassett about insurance on the barn took place after you purchased the station wagon?" "A. I can't remember." "Q. Do you recall in this examination that we had in Mr. Boyle's office in January [61] of 1942 that you told me your first conversation with Mr. Hassett, with regard to insurance on the barn, was a few days before you purchased the station wagon?" "A. I purchased the station wagon on the 25th of July." "Q. Do you recall stating to me in Mr. Boyle's office that you had your first conversation with Mr. Hassett about insurance on the barn before you purchased the station wagon, three or four days before, to be exact?" "A. It is so far back it is almost a year; I am not sure about that."

Mr. Levit: Will you stipulate he so testified at the first trial?

(Testimony of Silvo Questa.)

Mr. Boyle: I will stipulate as to what is in there.

Mr. Levit: As to what you just read?

Mr. Boyle: Certainly. It is in the record.

Q. Now, Mr. Questa, Mr. Boyle has referred to certain testimony regarding a statement in there that you made at his office. Do you recall the making of that statement in January of 1942?

A. Yes sir.

Q. Now isn't it a fact, Mr. Questa, that at that time, in January of 1942, and under oath, you stated at that time that this first conversation took place a few days before you purchased the car?

A. I wouldn't remember.

Q. Well, as a matter of fact, do you remember whether this first conversation with Mr. Hassett took place before or after you purchased the car?

A. About the barn—it was after I purchased the station wagon.

Q. You are quite sure of that, are you?

A. Yes sir.

Q. And you think your memory is better now than it was in January of 1942, just three or four months after the fire?

A. I don't think it is any better, but I think it is just as good.

Q. Now counsel, reading from page 65 of the record of the transcript, I am going to read to you, Mr. Questa, some questions and answers quoted from the examination under oath, taken in Mr. Boyle's office in January of 1942. Now before doing so, however, if the Court please, I wish to introduce

(Testimony of Silvo Questa.)

in evidence the non-waiver agreement that was Defendant's Exhibit 3 at the last trial. Calling your attention, Mr. Questa, to this paper headed "Non-Waiver Agreement", I will ask you if that is your signature and if you did execute it in the office of the attorney, Mr. Boyle, at the date it bears?

A. That is my signature.

Mr. Levit: We offer it in evidence and ask it be marked.

The Court: Any objection?

Mr. Boyle: No objection.

The Court: Defendant's Exhibit B.

## DEFENDANTS' EXHIBIT B

### NON-WAIVER AGREEMENT

This Agreement entered into at Reno, Nevada, on this 26th day of January, 1942, by and between Silvo Questa and Jennie Questa (first parties) and Milwaukee Mechanics' Insurance Company (second party),

Witnesseth:

Whereas, first parties have served upon second party a document entitled Amended Proof of Loss, making claim on second party for loss by fire to a certain barn under an alleged agreement to insure the same, said fire being stated therein to have occurred on or about midnight September 21, 1941; and

Whereas, second party has not and does not admit



(Testimony of Silvo Questa.)

the issuance of any insurance upon said barn or the making or entering into by it or on its behalf of any agreement to insure the same or to issue a policy of insurance upon the same; and

Whereas, it is to the mutual advantage of all parties hereto to permit second party to investigate all the facts and circumstances concerning the alleged agreement to insure, the alleged fire and claim, and to ascertain the value of the said barn and the loss and damage, if any, thereto, without delay;

Now Therefore It Is Hereby Agreed by and between the parties hereto as follows:

1. Second party shall be free (but not obligated) to investigate and make any inquiry it may see fit, and to take such steps as it may be advised, with respect to any of the matters aforesaid.

2. First parties agree to furnish to second party all information within their ability to furnish and to submit to examination under oath, with respect to the foregoing matters.

3. Anything done or to be done in connection with any of the matters aforesaid shall not constitute an admission of the existence of any agreement to insure the said property or of the existence of any insurance upon the said property, or of any liability whatever on the part of second party for the alleged loss or damage to said property; nor shall second party thereby be deemed or held to have waived, invalidated, forfeited or modified any legal rights available to it should it be ultimately determined



(Testimony of Silvo Questa.)

that insurance of said barn by second party in fact exists.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

(Signed) SILVO QUESTA

(Signed) JENNIE QUESTA,

First Parties.

MILWAUKEE MECHANICS'

INSURANCE COMPANY

(Signed) By BERT W. LEVIT,

Second Party.

[Endorsed]: Filed Dec. 4, 1944.

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Q. Now quoting from the transcript of that sworn examination in Mr. Boyle's office: "'Q. Mr. Questa, when did you first discuss insurance on this barn with Mr. Hassett? A. When I first discussed it, it was along in the latter part of July.

Q. Of 1941? A. About the barn, yes.

Q. And where did that conversation take place?

A. It took place in town here on the street.

Q. You met Mr. Hassett on the street?

A. Yes.

Q. Now your insurance, or some of it, had been handled through—— A. Mark Yori.

Q. What is his name? A. Mark Yori.

Q. Had you ever discussed insurance on the barn with Mr. Yori? A. No.

(Testimony of Silvo Questa.)

Q. So that the first conversation you had about the insurance on this barn was with Mr. Hassett?

A. That is right.

Q. And it was in July of 1941? A. Yes.

Q. How do you fix that date, Mr. Questa?

A. Well, I fix the date by I had bought a station wagon on the 25th of July.

Q. And was it on the same day that you——

A. No, I had talked to him about the barn and I told him that barn cost \$15,000.00 to build.

Q. Before you get that far, I am just trying to fix the date of this conversation. It was how long after you purchased the automobile on July 25th?

A. I had talked to him about the barn before that.

Q. Oh, you talked to him before that?

A. Yes.

Q. How long before that?

A. I couldn't be safe on the dates; a little while before.

Q. Would you say it was as much as a month before? A. Oh no.

Q. About a week before?

A. A few days, yes.

Q. A few days before July 25th?

A. That is right.'''

And then I will continue reading from the transcript of the first trial: "Now do you recall making that statement to me in Mr. Boyle's office?

A. Well, I guess that is the statement.

(Testimony of Silvo Questa.)

Q. It sounds right, doesn't it? A. Yes.

Q. Does that refresh your recollection as to whether or not this conversation, [64] this first conversation, that you had with Mr. Hassett took place in August or in July?

A. In July or the first part of August, as far as I can remember.

Q. But you know, do you not, that you purchased the station wagon on July 25th?

A. That is right.

Q. And you recall that you testified today on direct examination that your first conversation was with Mr. Hassett after you purchased the station wagon? A. That is right.

Q. And in January you said it was before you purchased the station wagon, is that right?

A. I guess that is right."

Now, do you recall so testifying?

A. No, I do not recall, but I guess it is right because it is there.

Mr. Levit: Will counsel stipulate that is correct?

Mr. Boyle: I will stipulate what you have read is taken from the record, yes.

The Court: We will take a brief recess at this time.

(Recess taken at 11:00 o'clock.)

11:15 A. M.

Mr. Questa resumed the witness stand on further cross-examination by Mr. Levit.

Q. Now, Mr. Questa, did you ask Mr. Hassett, on the first occasion that you spoke to him, which according to you was on August 1, 1941, to come down to the ranch and see the barn?

A. I asked Mr. Hassett on August 1st to insure my barn and to come down to the ranch and see the barn.

Q. You asked him to come down to the ranch and see the barn?           A. Yes.

Q. As a matter of fact you knew that was a part of the practice of his writing insurance, didn't you, his issuing the policy?           A. Yes.

Mr. Boyle: Objected to as conclusion of the witness.

Mr. Levit: He has already answered "yes", your Honor.

Mr. Boyle: I move that the answer be stricken until I have an opportunity to object.

The Court: All right, it may go out.

Mr. Boyle: My objection was as I stated.

The Court: I will allow the witness to answer the question, although I must confess I do not see what difference it makes whether the witness knew or he didn't know what the custom of the insurance company is. Let it stand though.

Q. Now your testimony now is that you asked Mr. Hassett to come down to the ranch and see the barn?

(Testimony of Silvo Questa.)

A. I asked Mr. Hassett to insure the barn for \$7500. for three years in the usual form, with the usual policy issued me on other property.

Q. Issued you on other property, but didn't you say just a moment ago that there were not any other policies issued to you on other properties that Mr. Hassett had for you?

A. He had the new house policy.

Q. You testified you hadn't gotten any policies prior to [66] August 1st.

A. He hadn't delivered it.

Q. So you didn't know then what the form was and you don't mean—I will withdraw that. As a matter of fact, most of your insurance transactions with Mr. Hassett took place after this conversation of August 1st, didn't they?

A. And August 1st.

Q. And at August 1st? A. Yes.

Q. The only transaction of insurance, as I understand it, you had with Mr. Hassett was insurance on the new house, which culminated later in Defendant's Exhibit "A", and the insurance on the station wagon, is that correct? A. Yes.

Q. And the station wagon may or may not have occurred before the date of this conversation?

A. The station wagon occurred before the date of the barn.

Q. That is your testimony now? A. Yes.

Q. Does Mr. Hassett still handle your insurance?

A. Yes, he handles some of my insurance.



(Testimony of Silvo Questa.)

Q. Didn't you say a moment ago on direct examination that Mr. Hassett is your insurance agent and insures everything that you have?

A. Yes, he insures everything I desire to have insured.

Q. And that is a fact at the present time, is it?

A. Yes, he has some of my insurance.

Q. And it has been a fact ever since the time we are talking about in 1941?

A. Yes.

Q. Do I understand you to say now that you carry insurance with other general agents besides Mr. Hassett?

A. Mr. Hassett carries around 80 or 85 per cent of my insurance.

Q. Of course you know that Mr. Hassett no longer represents the Milwaukee Mechanics', don't you.

A. Yes, very well.

Q. Now, in order to refresh your recollection as to whether or not you asked Mr. Hassett to come down and look at the barn, calling your attention to page 69 of the transcript: "Q. What else was said at the conversation about this insurance? I am not speaking about the automobile insurance now. A. And he said he would come down to the ranch to look — 'I will come down and look.' " (being quoted) "Q. Did you ask him to come down? A. No, he said he would come down." Do you recall so testifying?

A. No, I do not recall so testifying, but if this is what I testified—

Mr. Levit: Will counsel stipulate?

Mr. Boyle: I didn't get the exact line.

(Testimony of Silvo Questa.)

Mr. Levit: The last three or four lines on Page 69.

Mr. Boyle: (Reads) "And he said he would come down to [68] the ranch to look—I will come down and look.'" "And you asked him to come down." Is that what you have reference to? "And he said he would come down."

Mr. Levit: "Q. Did you ask him to come down?"

A. No, he said he would come down."

Mr. Boyle: Yes, that is there.

Mr. Levit: Is that stipulated?

Mr. Boyle: I will stipulate.

Q. Now referring to the fact of insurance on the stone house, that is, the old house as compared to this new house we have been talking about, is that correct? A. Yes.

Q. I believe you testified a few moments ago, would it be correct to say, that that is the old house and this other house that was insured under policy, Defendant's Exhibit "A", was the new house?

A. Yes.

Q. Now you said that at this first conversation, in addition to mentioning insurance on the barn, insurance on the automobile, you also requested insurance of four thousand dollars on the stone house?

A. Yes.

Q. That is correct? A. Yes.

Q. Now you recall, of course, the sworn examination in Mr. Boyle's office in January of 1942, do you not? [69] A. Yes.

Q. You recall on that occasion that you were

(Testimony of Silvo Questa.)

asked to relate all of the conversation you had with Mr. Hassett on August 1st?

The Court: Read the questions if you have them.

Mr. Levit: I will withdraw that.

Q. Is it not a fact that although you related, or purported to relate, the conversation with Mr. Hassett on August 1st, that you made no mention of making any statement or having any discussion to or with Mr. Hassett concerning any insurance on the stone house?

A. If I did—but he was supposed to insure the stone house at the same time.

Q. But it was a fact that you did not?

Mr. Boyle: Objected to the instrument itself is the best evidence.

Mr. Levit: I am entitled to question the witness about his recollection.

Q. As a matter of fact, I will call your attention to page 73 of the transcript and ask you if you recall testifying as follows: "Q. You didn't say anything to me in that conversation as you related it \* \* \* \*" (referring to the sworn examination of January, 1942) "'\* \* \* \* you didn't say anything to me in that conversation as you related it about any insurance on the house, did you?" "A. I guess I didn't. Q. How do you account for that, Mr. Questa? A. Well, it was just a lucky thing, I guess, that the house didn't burn down, or I would have the [70] same trouble. Q. I say how do you account for the fact when you related the conversation to me before in January, you did not state any-

(Testimony of Silvo Questa.)

thing about any conversation concerning the house and insurance on the house? A. No. Q. Can you account for that? A. Well, it was taken care of then. He had his policies then and the stone house hadn't a policy, so why bring that up? Q. You didn't get the policy on the house, did you, until after the fire? A. That is right." Do you recall so testifying? A. Yes.

Q. And that is the fact, is it not, that you did not mention that in the conversation that you related when you related it in January, 1942, under oath?

A. How is that question?

Q. I say it is a fact, is it not, in January, 1942, when you purported to relate the entire conversation with Mr. Hassett, that you made no mention of having any conversation about insurance on the stone house? A. On August 1st?

Q. On August 1st. A. Yes.

Q. That is a fact, isn't it? A. Yes.

Mr. Boyle: Your answer is that you did not mention the stone house, is that it?

A. That I did mention the stone house. [71]

The Court: Of course you complicated it, counsel, by asking him something from memory that you already asked him from the record.

Mr. Levit: It is a difficult thing, your Honor, to prove a negative statement, that is the reason I thought I had to get at it in a sort of round-about way.

Q. Now did you tell Mr. Hassett on August 1, 1941, assuming that was when this conversation oc-



(Testimony of Silvo Questa.)

curring, that the reproduction cost of the barn was so much, or the value was so much? Did you have any discussion with him about the values or reproduction cost?      A. Yes.

Q. Now in relating the conversation on direct examination, of August 1st, I do not believe you made any mention of that. I may be wrong, but will you tell us please what the conversation was now that you had concerning values and reproduction cost?

Mr. Boyle: Are you referring to the record?

The Court: If counsel is referring to direct examination, my recollection is that the witness was not questioned about conversation with respect to value, but merely gave his conversation.

Mr. Levit: May I respectfully suggest the witness was asked to give the conversation he had with Mr. Hasset on reproduction cost or value of the barn.

The Court: The record speaks for itself.

Q. What is the fact with regard as to whether or not you did [72] on August 1st have any conversation with Mr. Hassett concerning values or reproduction cost of the barn?

A. I asked him to insure the barn for \$7500.

Q. Was any other amount mentioned?

Mr. Boyle: If that is an impeaching question, your Honor——

The Court: There is nothing before the Court.

Mr. Boyle: I know. If it is intended to be, the proper method would be to show him the record and



(Testimony of Silvo Questa.)

ask him if he testified at a certain date accordingly and read the record.

The Court: Counsel is just asking now if he had any discussion as to any other amount.

Mr. Levit: That is right.

A. Yes, we talked about it.

Q. About what? A. Values.

Q. What did you say about values?

A. I said the barn is worth \$15,000. I want it insured for \$7500.

Q. Now on direct examination, when you related the conversation you made no mention of that and are you quite sure now that what you told Mr. Hassett on that occasion was that the barn was worth \$15,000? A. That is right.

Q. And isn't it a fact that the actual conversation that you had with Mr. Hassett at that time was not with relation to the value of the barn, but with relation to the reproduction cost of [73] the barn?

A. No, not reprdouction cost.

Q. That is not correct? You never mentioned reproduction cost? A. Not that I know of.

Q. Referring to page 85 of the transcript—

A. (Interrupting): I believe I said it would cost \$15,000 to build that barn.

Q. You believe you said that to Mr. Hassett on August 1st? A. I am quite sure.

Q. That would be contradictory to the statement that you told Mr. Hassett—

Mr. Boyle: We object, your Honor, on the grounds such statement is argumentive and also conclusion on the part of counsel.

(Testimony of Silvo Questa.)

The Court: Counsel hadn't finished the question.

Mr. Levit: I will withdraw the question and rephrase it.

Q. A moment ago, Mr. Questa, you said on August 1st you told Mr. Hassett that the barn was worth \$15,000 and then a few moments later you said its reproduction cost was \$15,000. Now which is correct, which do you say?

A. I said the barn was worth \$15,000; it was worth \$15,000.

Q. You said it was worth \$15,000?

A. Yes.

Q. Did you mention reproduction cost?

A. No.

Q. You did not. Now calling your attention to page 85 of the [74] transcript, I will ask you if you recall giving the following answers to the following questions: "Q. Now did you ever mention to Mr. Hassett the reproduction cost of the barn prior to the fire? A. Before the fire? Q. Yes. A. Yes. Q. When? A. What was that question? Q. Before the fire? A. No. Q. You are quite sure of that, are you? A. Sure. Q. Now calling your attention again to the statement that you gave me in Mr. Boyle's office: 'Now what was your conversation with him at that time?' This refers to the first conversation. 'A. I told him I wanted to insure that barn. You know he has insurance on the new house and I told him I wanted insurance on that barn and he asked me what I thought of the barn. I said, 'Oh, the barn is a huge thing, it

(Testimony of Silvo Questa.)

cost \$15,000.00 or more to build it today.' '' Do you recall so testifying?           A. Yes

Q. So it is a fact, is it not, Mr. Questa, that on the original examination taken in January, 1942, you testified that you told Mr. *Questa* that the reproduction cost of the barn was \$15,000 on August 1st?

Mr. Boyle: Your Honor, we must interpose an objection at this time to the manner of interrogating this witness, for the reason that the words used by Mr. Levit. are confusing. While we will admit that when it is said "to build it today" and "to reproduce it" would have the same meaning, the words would be synonymous, but nevertheless we would prefer that the words of the record be used in asking the question of Mr. Questa to ask [75] him if he mentioned anything about the barn being built today, what it would cost, rather than reproduction value because it has a tendency to confuse.

Mr. Levit: I have no desire to confuse the witness I will try this other language.

Q. You replied, did you not, Mr. Questa, in January, 1942, in the sworn examination, you stated you told Mr. Hassett on August 1st that it would cost \$15,000 to build the barn today. Do you recall that?

A. Yes.

Q. Now you also recall, from what I read a moment ago, do you not, that at the first trial of this action you testified that you were quite sure that you did not ever before the fire mention to Mr. Hassett the reproduction cost of the barn. That is correct, isn't it?

(Testimony of Silvo Questa.)

A. Reproduction and to rebuild is the same thing. The barn is worth \$15,000. I believe it is worth \$15,000. I do not know—to build it new, that is the same thing to me.

Q. In other words, your idea of value is the same as the cost of reproduction new, is that correct?

A. Yes.

Mr. Levit: If the Court please, at this time we move to strike the witness's testimony given on direct examination as to value of the barn, on the ground the witness has demonstrated by his last answer that he does not have any proper conception of the meaning of the term "value" as related to the issues of [76] this action.

Mr. Boyle: May it please the Court——

The Court: I will deny the motion.

Q. Now you had two other conversations with Mr. Hassett, according to your testimony, Mr. Questa, concerning the policy of insurance after August 1st, that is correct, isn't it? A. Yes.

Q. Now it is a fact, is it not, Mr. Questa, that no amount of insurance was ever mentioned at either of these other conversations, either by you or Mr. Hassett? Isn't that correct?

A. After the first conversation?

Q. Yes sir. A. No.

Q. You mean no, no amount was ever mentioned, or no, that is not correct?

A. The amount was mentioned along the first of August.

Q. At the first conversation? A. Yes.

(Testimony of Silvo Questa.)

Q. And no amount of insurance was mentioned by either of you any time after that, prior to the fire, is that correct?

A. After that, no, not that I remember.

Q. That is correct then? A. Yes.

Q. Now the second conversation that you spoke of was when you said you met Mr. Hassett on Virginia Street about one p.m. in the middle of August. How do you fix that date, Mr. Questa? [77]

A. I fix the date along about the 15th that my wife had made him a check——

Mr. Levit: You have the check, Mr. Clerk?  
(Check produced.)

Q. Calling your attention to a check dated August 15th and signed by Jennie Questa, 1941, on the First National Bank, payable to Frank Hassett, Inc., in the amount of \$75.00, I will ask you if that is the check you are referring to? A. Yes.

Q. That is the check that fixed the date of the second conversation you had with Mr. Hassett?

A. Yes.

Mr. Levit: We will offer the check in evidence and have it marked Defendant's Exhibit next in order.

The Court: Defendant's "C."



(Testimony of Silvo Questa.)

DEFENDANT'S EXHIBIT C

Sparks, Nevada, Aug. 15, 1941

Pay to the Order of Frank Hassett, Inc., \$75.00  
(Seventy-five and no/100) Dollars.

[94-61] Sparks Branch [94-61]

First National Bank

In Reno

Sparks, Nevada

JENNIE QUESTA

[Stamped on reverse side of check]:

94-2 First & Vine Branch 94-2

Pay to the Order of First National Bank of  
Nevada.

Frank Hassett, Inc.

Pay to the Order of Any Bank, Banker or Trust  
Company or Through Reno Clearing House All  
Prior Endorsements Guaranteed.

Aug. 16, '41. 0004

First National Bank of Nevada

First & Virginia Branch

94-2 Reno, Nevada 94-2

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Q. Now did Mr. Hassett come to the ranch before  
or after that check was made out?

A. He came to the ranch after that check was  
made out.

Q. I will call your attention to the examination  
under oath again as quoted on page 78 of the record.

(Testimony of Silvo Questa.)

Do you recall this testimony, relating to the bookkeeper of Mr. Hassett's who came to the ranch on the day this check was made out and to whom it was given. You recall that, do you not: "“ \* \* \* so he came down.

Q. Came to your ranch?

A. To the ranch and I had just left for town.

Q. When was that?

A. That was before the 15th of August.''' I am sorry—I will have to withdraw that question—the reference was not to the bookkeeper. It was to Mr. [78] Hassett. Referring to Mr. Hassett: "“ \* \* \* so he came down.

Q. Came to your ranch?

A. To the ranch and I had just left for town.

Q. When was that?

A. That was before the 15th of August'.' Do you recall so stating? A. No, I do not.

Mr. Levit: Will counsel stipulate that was the testimony given in January?

Mr. Boyle: I will stipulate that was in the record.

Mr. Levit: I am afraid I can't accept the stipulation in that form. I want a stipulation that was the testimony as given by Mr. Questa in January of 1942 in the sworn examination.

The Court: The record so shows, does it not?

Mr. Levit: Not necessarily so, your Honor. He followed that up by stating he did not remember so stating.

The Court: I am confused now because the wit-

(Testimony of Silvo Questa.)

ness has said it was after the check he had the conversation.

Mr. Levit: That is right.

The Court: What you are reading is the visit of Mr. Hassett to the ranch before the check was given, but by a later question the witness wasn't there, he had left.

Mr. Levit: I believe your Honor is quite correct and I would like at this point to clear it up and ask counsel to stipulate to that portion as being correct statement of the transcript of sworn examination.

The Court: There is no question about it? [79]

Mr. Boyle: No, I don't see any reason why it should be wrong.

Q. Did Mr. Hassett's visit to the ranch take place before or after Mr. Hassett's bookkeeper had been to the ranch on August 15th? A. After.

Q. The fact is that counsel has just stipulated you stated in that sworn examination that Mr. Hassett came to the ranch before August 15th. Can you explain that discrepancy?

A. To my remembrance he came after August 15th because I told his bookkeeper, I asked him where Frank was and he said he was at his office and I told his bookkeeper to tell Frank to come to the ranch, I wanted to see him.

Q. Your recollection now is that it was after the 15th of August that he came to the ranch?

A. Yes.

Q. Now was your second conversation with Mr.

(Testimony of Silvo Questa.)

Hassett about the middle of August before or after Mr. Hassett had been to the ranch?

A. It was before. The conversation on the street was before he came to the ranch.

Q. I am speaking of the second conversation you said took place about the middle of August.

A. Yes, the second conversation.

Q. It was before he had come to the ranch?

A. When I had the conversation with him in Reno it was before [80] he had come to the ranch.

Q. That was when you met him on Virginia Street at one p.m. the middle of August?

A. That is correct.

Mr. Boyle: That follows up what he wanted me to stipulate was correct. If you will read the rest of the testimony, I do——

Mr. Levit: May it please the Court, I have no objection to counsel reading any portion of the record.

Mr. Boyle: If you are going to read it, read all of it.

Mr. Levit: I am reading portions that seem relevant.

Mr. Boyle: We just want you to read the part you are interrogating him on.

Mr. Levit: That is what I am doing.

Mr. Boyle: You didn't do it that time.

Q. Isn't it a fact, Mr. Questa, that you testified as follows on the first trial of this action:

“Q. Oh, you asked him (meaning Mr. Hassett) to deliver your policy? A. Yes.

(Testimony of Silvo Questa.)

Q. And you did not say anything to him then about not coming out to the ranch?

A. No, he was to the ranch.

Q. And you were satisfied with that and you didn't expect him to come out again then?

A. No.

Q. Now, as a matter of fact, Mr. Hassett's visit to the ranch took place in your absence and before his bookkeeper came out to collect that check that you put in evidence?" etc. Now calling your attention specifically to the testimony you gave at the first trial that he was already out to the ranch when you had the second conversation, do you recall so testifying? [81]

A. I don't know, but it was after the 15th, after the second conversation.

Mr. Boyle: Mr. Levit, will you give me the page you are reading from?

Mr. Levit: That is page 77.

Q. Now also on page 82, isn't it a fact that you testified as follows:

"Q. When you saw Mr. Hassett in town before the fire and after he had been to the ranch, did you have any discussion with him as to the amount of insurance on the barn?

A. I asked Mr. Hassett about delivering my policy about the middle of August and I am quite sure that he had been at the ranch then, in between the 15th, 16, or 17th that I met Mr. Hassett——"  
And continuing:



(Testimony of Silvo Questa.)

“Q. I will withdraw the question. You told us this morning that you talked to Mr. Hassett in the middle of August and the last of August. Now I asked you which of those conversations took place after he had been at the ranch and you said that only the last one, you only talked to him once after he had been to the ranch, is that right?

A. No, I think I had a conversation on the street with him.

Q. After he had been to the ranch?

A. I don't remember.” Do you recall so testifying?

A. No, I do not.

Mr. Levit: Will counsel stipulate?

Mr. Boyle: I will stipulate that this is in the testimony, yes. I won't stipulate he does not remember.

Mr. Levit: That is what I mean, stipulate that this is his [82] testimony at the first trial.

Q. Now had Mr. Hassett come to the ranch prior to the third conversation which you said took place the last of August or early in September at the Riverside bar?

A. He came to the ranch after the 15th of August and the conversation I had with him at the Riverside bar was the latter part of August or the first week in September.

Q. Had he already been to the ranch?

A. He had been to the ranch.

Q. Were you expecting him to make another visit to the ranch at that time or did you feel, as

(Testimony of Silvo Questa.)

far as you knew, he had completed his examination of the property?

A. He had completed his examination of the property.

Q. Now isn't it a fact that Mr. Hassett said to you, when you asked him about the insurance, "I will take care of it; I will come down," meaning come down to the ranch?

A. That is what he said there at the Riverside as I walked by him.

Q. Now did you understand his statement that he would come down to the ranch if he had already been there and there was no occasion to visit the ranch?

A. He could come down any time, he could come down to visit. He had already been to the ranch.

Q. But the fact is there was no point, so far as you were concerned, to another visit to the ranch?

A. That is right. [83]

Q. Now, Mr. Questa, it is a fact, is it not, that at the time of the fire this barn was in excess of fifty years' old?

A. I wouldn't say that.

Q. Well, how old would you say it was?

A. Oh, I should judge the barn was around thirty-five years old.

Q. On what do you base your statement as to the age of the barn?

A. Well, just by hearsay that it had been there so long, that it was a landmark in this valley.

Q. You knew from hearsay also, did you not, that it was not built new at the time of construc-

(Testimony of Silvo Questa.)

tion? It was built of old timbers from Virginia City?

A. I heard the timbers came from Virginia City, just the timbers.

Q. It is a fact, is it not, that this property with the barn on it was owned by Mrs. Questa's family before you acquired it?

A. Her father and mother, yes.

Q. And do you know when they acquired it?

A. No, I do not.

Q. Do you know whether the barn was on it at the time they acquired it? A. No, I do not.

Q. Now you stated that you had taken the floor out of the barn, and the floor joists, too, is that correct?

A. No, just the floor, so I could put piers underneath, cement [84] piers, underneath these timbers.

Q. And you didn't take out the floor joists?

A. What do you mean by floor joists?

Q. I mean the timbers on which the floor is supported. A. Yes, I took all the floor.

Q. And you took all the floor joists out, too, didn't you? A. Yes.

Q. Now when did you do that?

A. Along in '38 or '39.

Q. So that from 1938 or 1939, whenever it was, there was no floor in the barn at all, was there?

A. No.

Q. And you say you put in these stone pillars—

A. Cement.

(Testimony of Silvo Questa.)

Q. —on which to build supports for the wall, etc?      A. For the timbers, foundation.

Q. Let me ask you, how much did you spend on the barn for putting in those concrete pillars?

A. As I recall it, about \$500.

Q. Five hundred dollars?

A. Yes, I think so.

Q. What other work did you do on the barn since you took it over? When did you take it over, by the way?      A. 1932.

Q. Now what work did you do on the barn from the time that you took it over? [85]

A. That work there.

Q. You mean putting in concrete pillars?

A. Yes.

Q. And what else?

A. And had it all straightened out and fixed some doors and windows, had it painted.

Q. Just a minute. Now the doors and windows you had all straightened out, you say?

A. The frames.

Q. Had they warped?

A. No, they hadn't warped but on some of them posts they started to sink so I just leveled it all up and put cement under all of them.

Q. And how much did you spend on fixing the windows and doors?

A. I don't remember; \$500 for the whole thing.

Q. That included the concrete pillars and windows and doors?      A. That is right.

Q. What other work did you do on the barn? I think you said something about painting it.

(Testimony of Silvo Questa.)

A. I painted it years before that.

Q. How long before the fire?

A. Oh, I think it was around eight years before the fire.

Q. It might have been a little longer than that?

A. Well, eight or nine, I don't remember right to the year. Could have been ten.

Q. How much did you spend in painting that?

A. I don't recall now.

Q. You had it done by some outfit that was just passing through at the time, didn't you?

A. Yes.

Q. The roof of this barn had never been reshingled, had it?

A. The roof was in good shape except one little corner.

The Court: No, the question was had it ever been reshingled?

A. No, I didn't have to reshingle it, no.

Q. Now in addition to tearing out the floor and the floor joists two or three years before the fire and not replacing them, you had also taken out all of the stalls that were in the barn, hadn't you?

A. Yes.

Q. And you never replaced any of those?

A. No, sir.

Q. And in addition to that, there was a sort of second story in the barn, wasn't there?

A. There was a big second story.

Q. And you used that for storing onions, didn't you?

A. That is right.



(Testimony of Silvo Questa.)

Q. And in order to get air to the onions, you had pulled up some of the boards in the floor, hadn't you, of the second story? A. That is right.

Q. And you tore out those boards?

A. For air circulation.

Q. You had never replaced them prior to the fire?

A. We replaced them. When we put the onions back, then we took them out.

Q. The fact is that you pulled the boards out of the hay loft floor to get air to the onions?

A. Yes, but the boards were up there all the time.

Q. They weren't there at the time of the fire, they weren't in place?

A. They were not in place, no.

Q. You mean you had the boards put away?

A. That is right.

Mr. Levit: I think that is all, your Honor.

#### Redirect Examination

By Mr. Boyle:

Q. I show you a certain instrument and ask you if you are familiar with the signature on there? Is that your handwriting? Did you sign it?

A. Yes.

Q. And this also—they are both together?

A. Yes.

Q. This is termed "Proof of Loss?"

A. Yes.

Mr. Boyle: Your Honor, I would like to offer this in evidence.

(Testimony of Silvo Questa.)

Mr. Levit: No objection. [88]

The Court: Plaintiffs' Exhibit 3.

### PLAINTIFFS' EXHIBIT No. 3

#### PROOF OF LOSS

State of Nevada,

County of Washoe—ss.

Silvo Questa, being first sworn says: That Silvo Questa and Jennie Questa were the owners of a large barn situated on the Glendale Ranch in Washoe County, Nevada; That during the first part of August, 1941, Frank Hassett as agent for the Milwaukee Mechanic's Insurance Company entered into an agreement for and in consideration of the premiums to be paid for insuring an automobile and a home and a large barn on the said Glendale Ranch; That it was agreed that the barn was to be insured for the sum of Seven Thousand Five Hundred Dollars (\$7,500.00); That Frank Hassett as agent for The Milwaukee Mechanic's Insurance Company was to deliver a policy to Silvo Questa and Jennie Questa and the said Frank Hassett was to collect the insurance premiums; That Frank Hassett did not deliver the said insurance policy as agreed upon and the barn burned down on or about September 20, 1941 and was completely destroyed; That Silvo Questa has heretofore notified the said insurance company of the loss of fire of the barn aforesaid. That this affidavit is in the form of a written notice and proof of loss by fire

(Testimony of Silvo Questa.)

of a barn insured by the Milwaukee Mechanic's Insurance Company, situated on the Glendale Ranch the property of Silvo and Jennie Questa; That the said barn is a total loss.

Dated: January 8, 1942.

SILVO QUESTA

Subscribed and sworn to before me this 8th day of January, 1942.

[Seal]

WILLIAM S. BOYLE

Notary Public, Washoe  
County, Nevada

### AMENDED PROOF OF LOSS

State of Nevada,

County of Washoe—ss.

Silvo Questa, being first sworn says: That Silvo Questa and Jennie Questa were the owners of a large barn situated on the Glendale Ranch in Washoe County, Nevada; That during the first part of August, 1941 Frank Hassett as agent for the Milwaukee Mechanic's Insurance Company entered into an agreement for and in consideration of the premiums to be paid for insuring an automobile and a home and a large barn on the said Glendale Ranch; That it was agreed that the barn was to be insured for the sum of Seven Thousand Five Hundred Dollars (\$7,500.00); That Frank Hassett as agent for The Milwaukee Mechanic's Insurance Company was to deliver a policy to Silvo Questa and Jennie Questa and the said Frank Hassett was

(Testimony of Silvo Questa.)

to collect the insurance premiums; That Frank Hassett did not deliver the said insurance policy as agreed upon and the barn burned down on or about midnight September 21st, 1941 at 12:10 A.M. and was completely destroyed; that there was an incumbrance of Sixteen Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents (\$16,666.66) on the ranch; that there was no other insurance thereon; that the origin of the fire is unknown; That Silvo Questa has heretofore notified the said insurance company of the loss of fire of the barn aforesaid, namely on September 26, 1941 and again demanded the policy of insurance. That this affidavit is in the form of a written notice and proof of loss by fire of a barn insured by the Milwaukee Mechanic's Insurance Company, situated on the Glendale Ranch the property of Silvo and Jennie Questa; That the said barn is a total loss; That no insurance policy was delivered to the insured to this date; that there was no change in the title, use, occupation or exposure of the barn since, 1940.

Dated Jan. 19, 1942.

SILVO QUESTA

Subscribed and sworn to before me this 19th day of January, 1942.

[Seal]

WILLIAM S. BOYLE

Notary Public, Washoe  
County, Nevada

[Endorsed]: Filed Dec. 4, 1944.

(Testimony of Silvo Questa.)

Mr. Boyle: And I also desire to put in evidence a letter which was received—I will have Mr. Levit take a look at that. You remember receiving that, do you not?

Mr. Levit: Well, no, I never received it. I have no objection. It was in at the first trial. It wasn't addressed to me, your Honor.

Mr. Boyle: It was put in by you.

Mr. Levit: I have no objection to it going in.

The Court: Plaintiffs' Exhibit 4.

PLAINTIFFS' EXHIBIT No. 4

William S. Boyle

Attorney at Law

202-3-4 Gazette Building

Reno, Nevada

Phone 5592

January 8th, 1942

Frank Hassett, Esq.

Agent

The Milwaukee Mechanic's Insurance Co.

Reno, Nevada

Dear Mr. Hassett:

I am enclosing a proof of loss in affidavit form for a large barn situated on the Glendale Ranch, Washoe County, Nevada, the property of Silvo and Jennie Questa which was destroyed by fire on or about September 20, 1941.

Very truly yours,

W. S. BOYLE

William S. Boyle

WSB:jm

[Endorsed]: Filed Dec. 4, 1944.



(Testimony of Silvo Questa.)

Mr. Levit: While counsel is looking at his notes, I have two other questions I would like to ask.

The Court: All right.

By Mr. Levit:

Q. I believe you testified you had no discussion as to values at all or amounts of insurance on either the second or third conversation with Mr. Hassett, is that correct? A. Yes.

Q. Although there is no doubt that at least one or possibly two, both, of those conversations had taken place after Mr. Hassett had been out to the ranch, is that correct? A. One.

Q. At least one of them took place after Mr. Hassett went to the ranch, is that right?

A. Yes.

Q. I believe you testified it was the custom, in regard to [89] your dealings with Mr. Hassett, that Mr. Hassett would go out to the ranch or out to the property and inspect it, in order to determine what amount of insurance he would be willing to put on it, and thereafter you and he would discuss the matter and arrive at some satisfactory figure for the final policy, do you recall so testifying?

A. Yes.

Q. Then how do you explain the fact that on this conversation you had with Mr. Hassett after he had been to the ranch, there was no conversation with you with reference to the amount of insurance to be carried?

A. I saw Mr. Hassett once after he had been to the ranch and there was no discussion about values of a policy. I met him at the Riverside bar.

(Testimony of Silvo Questa.)

Q. But you did discuss the insurance?

A. I asked him about the policy and he said he would take care of it, the last time I saw him after he had been to the ranch.

Q. I asked you whether you could explain why there was no discussion of values, inasmuch as you testified your custom was, after Mr. Hassett had inspected the property, there would be in the ordinary course a discussion of the amount of insurance you would finally agree upon.

A. Yes, if it was too little, we would raise it and if it was too much, we would lower it.

Q. But on this occasion you did not see any point to discussing it? [90]

A. He agreed to insure it for \$7500.

Q. Now one more question. How much, in your opinion, would a barn of the type of the barn that is the subject of this action, depreciate in a year?

A. I don't know anything about depreciation. The barn was in excellent condition and we kept it up and were going to fix it up——

The Court: The question was what you say a barn like this would depreciate? What percentage, is that what you mean?

Mr. Levit: Yes, your Honor.

A. It would depreciate——

Mr. Boyle: I interpose an objection at this time, your Honor, on the ground the question is unintelligible, for the reason a barn is like a building or any other structure; it would depreciate depending

(Testimony of Silvo Questa.)

upon lack of care that the building has, so consequently there is no way of fixing.

The Court: Do you object to the question?

Mr. Boyle: Yes, your Honor, upon the ground stated.

The Court: It would not be very helpful to the Court what Mr. Questa said was the depreciation.

Mr. Levit: Except this—counsel has asked the question and there is in the record statement as to the value of the barn. Obviously it is proper cross-examination to ascertain the depreciation factor that the witness took into consideration, if any, in fixing his value, which is in the record. [91]

The Court: Ask him how he took that into consideration.

Q. Did you, Mr. Questa, have any idea whatever, or have you any idea whatever now, of the depreciation that a building of the type of this barn would incur in the course of a year?

A. No, I have not.

Mr. Levit: That is all.

(Recess taken at 12:00 o'clock until 1:30 P.M.)

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### Afternoon Session

December 4, 1944—1:30 P.M.

### MR. QUESTA

resumed the witness stand.

Mr. Boyle: If the Court will permit me, I would like to ask one or two questions on direct.

(Testimony of Silvo Questa.)

Q. Mr. Questa, what happened on the 20th day of September, 1941, with reference to the barn that we have been talking about all morning?

A. The barn burned down, was completely destroyed.

Q. Did the Milwaukee Mechanics' Insurance Company, through their agents or any one, deliver a policy of insurance to you?

A. No, sir.

Mr. Boyle: You may cross-examine.

Mr. Levit: No further questions. [92]

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JOHN FEURESTEIN,

a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boyle:

Q. What is your name, please?

A. John Feurestein.

Q. Where do you reside, Mr. Feurestein?

A. 132 Winter, Reno.

Q. How long have you lived in Nevada?

A. Nine years.

Q. What is your business or occupation?

A. Construction; general contractor.

Q. How long have you been in that business?

A. In Nevada for approximately six years.

Q. And where else?

A. In Nebraska previous to that.

Q. How long have you been in the business alto-

(Testimony of John Feurestein.)

gether, whether in Nevada or Nebraska or elsewhere?

A. I have followed construction game ever since I was a boy.

Q. Did you serve your apprenticeship as a carpenter? A. As a carpenter.

Q. And then you became a contractor?

A. No, I was superintending work before I became a contractor.

Q. During that time what particular building did you construct? A. In Nevada?

Q. Any place? [93]

A. Well, I was in charge of work out here at the Reno Air Base, in charge of five hangars constructed out there, and also general foreman for J. A. Haddock, and I just completed a large barn out here in the country.

Q. Prior to that time, while you were apprentice and also, I presume, journeyman, did you work on large buildings? A. Yes.

Q. Name some of them for the Court.

A. I was foreman on the Sharp Building in Lincoln, Nebraska, one million five hundred thousand dollars, and carpenter on the Cornhuskers Hotel, Lincoln, Nebraska, and also worked on the State Capitol Building.

Q. Did you, during that time, acquire a knowledge of the values of buildings?

A. Well, I have been figuring work for the past 15 years.

Q. And during that time, by figuring work, you



(Testimony of John Feurestein.)

could answer the question asked, as to whether you acquired a knowledge of the value of buildings.

A. You would have to be able to estimate the cost of the job.

Q. Did you or did you not ever see a barn on the Questa ranch on the Glendale Road, the picture of which I am showing you?

A. Yes, I have seen this barn.

Q. Did you have occasion to inspect it or look at it?

A. I had the pleasure of being in that barn one Sunday afternoon, although Mr. and Mrs. Questa were not present.

Q. Will you describe the nature of the building?

A. Well, I couldn't but help notice the type of construction it was.

The Court: No; tell us what kind of building it was.

A. Well, for the age of the barn, it is a pretty well constructed barn.

The Court: The answer may go out. The question is, describe it, what it was made of.

A. The barn was constructed of huge timbers, had timbers as large as 10x12 and 8x8 and 6x6 which I noticed in there.

Q. What was the condition of the building?

A. At the time I saw it, the building appeared to me as though it had been reconditioned.

Q. The evidence is that the barn was destroyed on the 20th of September. Now when did you see it prior to that time?

(Testimony of John Feurestein.)

A. Well, this was in August.

Q. That would be a month before?

A. It was in August when I saw the barn.

Q. Do you know the value of that barn in your estimation, your opinion, at the time you saw it a month prior. It was burned on the 20th of September, 1941.

Mr. Levit: Just a moment, if the Court please, I object to the question on the ground—of course, I realize it is a preliminary question and calls for a yes or no answer, but I am going to object to this witness giving any testimony as to values. In the first place, he has not been qualified sufficiently as an expert to testify as to values; in the second place, [95] because he has not been shown to have had a sufficient opportunity for observation and has not been shown to have made a sufficient observation of the barn to enable him to place a value on it, so on the two grounds; that is, first upon lack of qualifications as an expert to give testimony, secondly upon lack of his knowledge of the barn in question, we object to any further questions on value of this witness.

Mr. Boyle: With relation to the objection, your Honor, pertaining to his not having opportunity to inspect, not having inspected it, he said he observed the construction of the barn and he gave the size of the timbers and he said he had been in the barn and looked it over, and so far as foundation for expert testimony is concerned, a man with his experience—I could ask further questions on that.

(Testimony of John Feurestein.)

Q. How old are you? A. Forty-one.

Q. How old were you when you first became an apprentice? A. Sixteen years old.

Q. And you took four years, I presume, to learn the business? A. Yes.

Q. That is to qualify as a journeyman?

A. Yes.

Q. And you subsequently became general superintendent. From the time you were 16 up to and including the present time, and also inclusive of that time back on the 20th day of September of 1941, you had been continuously in the building business, is [96] that so? A. Yes.

Q. And have you ever built any barns before?

A. Yes.

Q. Where have you built the barns?

A. I have built barns in Woodlawn, Nebraska, a huge barn which was 135 feet long and 48 feet wide.

Q. Did you build any barns in this county?

A. One south of Reno, a barn 52 feet wide and 60 feet long, which cost \$12,000.

Q. That one you just mentioned, how would that compare with the Questa barn we have been discussing?

Mr. Levit: Objected to as irrelevant.

The Court: Maybe he means size.

Mr. Boyle: Size and also value, too.

The Court: I will sustain the objection as to value, but he can testify as to size and material.

Q. How did it compare in size and construction?

Mr. Levit: Same objection.

(Testimony of John Feurestein.)

The Court: I will allow it.

A. From what I seen of the Questa barn, the Questa barn appeared to me as approximately twice as large, that is in length, as this barn I constructed.

Q. The questions were asked this morning, and argument and objection, as to the matter of depreciation of barns. Do you know anything about depreciation of barns or buildings? [97]

A. Yes.

Q. With relation to a barn like the one you saw on the Questa Ranch, the Questa barn, the question was asked, what would be the depreciation in a year. Could you answer that question? A. Yes.

Mr. Levit: We object to the question and ask the answer be stricken. We object to the question on the ground it is irrelevant and immaterial, calls for conclusion of the witness, and I am going to object to any further questions on the subject of depreciation on the ground the witness has not been qualified properly as an expert.

Mr. Boyle: As far as that is concerned, your Honor, of course that matter is entirely up to the court as to qualifications.

The Court: I do not see what depreciation has to do with it. Can't this witness testify as to how much a barn like this would cost, built in its original state, if he knows?

Mr. Boyle: I asked that only because the question was asked here.

The Court: Yes, counsel did ask, but whether he knew how much a barn depreciates——

(Testimony of John Feurestein.)

Mr. Boyle: He said he didn't know.

The Court: I notice in this photograph—is that corrugated iron on the outside of this barn, or are those slats? [98]

A. Slats.

The Court: The entire barn is of wood?

A. Yes.

The Court: Have you any idea how much lumber there is in it?

A. There is board feet, around 125 to 135 board feet; that is 135 thousand board feet of lumber.

Mr. Levit: May it please the Court, I would like, for the purpose of the record, to move that the answer be stricken and before any questions are put to the witness in connection with the condition of the barn or its construction and the amount of lumber and cost, etc., that we be permitted to examine him further as to his qualifications.

The Court: The only question I asked the witness was how much lumber there was in it. He is qualified to answer that.

Q. (By the Court): What kind of lumber was it?

A. It was pine.

Q. (By the Court): What types of lumber were used in the barn?

A. Mostly dimension lumber. You know 2-inch or heavier is considered dimension lumber.

Q. (By the Court): Mostly lumber 2 inches or larger?

A. No, the floor was one inch also.



(Testimony of John Feurestein.)

Mr. Levit: May it be understood our objection goes——

The Court: You may have objection to the Court's questions. Go ahead.

Q. (Mr. Boyle): What value would you place upon that? What [99] would be your opinion of the value of that building the time you had seen it one month prior to the fire?

Mr. Levit: Objected to on the grounds already stated—the witness has not been qualified to testify to the value of property of this kind, or any kind for that matter; that he has not been shown to have a sufficient familiarity with this barn. The fact he was there on a Sunday afternoon does not qualify him to testify as to cost of construction, and that is the only familiarity that he has showed to have had, the fact that he was in it one Sunday afternoon.

The Court: I think your objection goes to the weight of the testimony. I will overrule. You may answer.

A. Will you state the question again?

Q. In your opinion, what would be the value of that barn we have been discussing, the Questa barn, on the Glendale Road, on the Questa Ranch, at the time you saw it one month prior to the fire?

Mr. Levit: Same objection, and I ask the Court again at this time for permission to cross-examine the witness as to his knowledge of the barn prior to giving any testimony.

The Court: You may examine the witness. Go ahead.

(Testimony of John Feurestein.)

Cross-Examination

By Mr. Levit:

Q. What was the occasion of your visit to the Questa ranch on the Sunday afternoon in question?

A. I am glad you asked that question. I knew Mr. Questa for some time and on many occasions he had invited me out there and asked me to go to the ranch and I love to ride and he said he [100] would be glad to have me come out and he would let me have a horse to go horseback riding, and so upon this Sunday afternoon I was driving in that vicinity and stopped in at the ranch, although Mr. and Mrs. Questa were not there, and after being at the ranch, I noticed the construction of this barn, for the reason that I follow construction, and being it was such a large barn, it naturally drew my attention to go into it, so I went into the barn and looked the barn over.

Q. I see, and how long were you in the barn?

A. Oh, I would say about three-quarters of an hour.

Q. What did you say the construction of the floor was?           A. There is no floor in the barn.

Q. I thought you said it was one-inch flooring?

A. I was referring to the floor overhead.

Q. Oh, I see. What was the condition of that floor?

A. Well, the floor at that time had some boards loose, some boards torn up and I don't know where the boards were or anything. Of course, I didn't examine anything like that. I didn't realize anything like this coming up.

(Testimony of John Feurestein.)

Q. Certainly not. In other words, you just went in there for a casual look around?

A. To look the construction over, for this reason, that that type of construction is being discontinued and has been discontinued for a number of years.

Q. Yes, it is the sort of construction that wouldn't be used today. [101] A. No——

Q. Let me ask you——

Mr. Boyle: Did you want to say something?

A. Because the cost of construction would be entirely too high.

Q. (Mr. Levit): In other words, you could get the same utility, everything, by lower type of construction?

A. That is true, but if that type of barn was built today, I would say that it would cost \$35,000.

Mr. Levit: I ask that the witness' answer be stricken as not responsive.

The Court: It may go out.

Q. Now, Mr. Feurestein, what other buildings did you go into on the ranch?

A. I didn't go into any other buildings on the ranch. The hired man and I were in the barn.

Q. The hired man of Mr. Questa's?

A. Yes, I presume he was the hired man or the caretaker while Mr. and Mrs. Questa were away.

Q. What did you do when you got there?

A. I stopped in there and this man came up and I asked him where Mr. Questa was and he told me Mr. and Mrs. Questa were away for the day.

(Testimony of John Feurestein.)

Q. Is that man in the courtroom?

A. No, I haven't seen him.

Q. Have you seen him since that time?

A. No, I have not. [102]

Q. Do you know his name?

A. No, I do not.

Q. Did you ask his permission to go into the barn?

Mr. Boyle: Objected to as incompetent and immaterial.

Mr. Levit: I think we have a right to find out what he did.

The Court: Well, I don't think so, but I will overrule the objection.

A. I was sitting in my car at the time and we got talking about the barn and I told him it was a huge barn and admired it and he said, "If you wish to, we will go over and take a look at it."

Q. As a matter of fact, you have never had any experience yourself in constructing that type of construction, have you? A. No, not that type.

Q. But as a matter of fact they did not build that type of building in your contracting experience?

A. For this reason, that was before my time, that type of construction.

Q. That is the point. Now, did you go up into the hay loft?

A. No, I did not go up into the hay loft.

Q. Did you look at the construction of these concrete pillars that were there?

(Testimony of John Feurestein.)

A. Yes, the piers.

Q. The piers? A. Yes.

Q. So not going up in the hay loft, it wasn't possible for you to see the construction of the roof?

A. Oh, yes, you could see the construction of the roof looking up; that is, where the boards were torn up.

Q. Oh, there were so many boards torn off you could look up through?

A. I don't know. At an angle you can, of course, you can do that if there is only one board up.

Q. And you say the barn was entirely made of wood? A. Yes, wood construction.

Q. Was there any metal in the barn, to your knowledge, did you see any?

A. Not that I recall.

Q. So that actually you do not know, of your own knowledge, how the roof was put on the barn, do you? A. It was a wood roof.

Q. Oh, it was shingled? You could see from the outside? A. Yes.

Q. But I mean as far as the type of construction, the way the roof and rafters were put together?

A. You could see that up through places where the boards were taken off.

Q. Oh, you could? A. Yes.

Q. But you saw nothing but wood, is that correct? A. You could see the trusses.

Q. The wooden trusses? A. Yes. [104]



(Testimony of John Feurestein.)

Q. Now you said there were some heavy timbers in the barn; I think you said some of them were 10 x 10.      A. 10 x 12.

Q. And some were 8 x 8 and some 6 x 8, I think you said?      A. 6 x 8, yes.

Q. Which timbers were 8 x 8?

A. They had some posts supporting the girders.

Q. Any 10 x 10 timbers corner supports?

A. No, I don't think there was. I don't recall them.

Q. Now you don't know, do you, whether there were metal braces in this building?

A. Yes, I noticed that, but that wasn't the original construction. That was due to remodelling.

Q. Don't you recall that I asked you two or three times whether you saw anything but wood construction and you said no?

A. Well, small braces, these metal angle irons, things of that kind that were put in there afterwards, after the barn was remodelled, which you would notice walking into the barn.

Q. So that if the posts and plates were 10 x 10, you simply didn't notice that, is that correct?

A. Oh yes, you notice those.

Q. You noticed 10 x 10?

A. No, the posts were not 10 x 10. I didn't make that statement.

Q. No, I didn't say you did.

A. I said the posts were 8 x 8. [105]

Q. Now you did not go there with an idea of making an estimate of the construction cost of the barn?      A. No.

(Testimony of John Feurestein.)

Q. You did not go there with an idea of making an estimate of the value of the barn, did you?

A. Well you know being that you follow the building game, you would naturally likely have some——

The Court: That wasn't your purpose?

A. No, that wasn't my purpose, although while I was there I admired and I kind of looked the barn over and to my satisfaction kind of figured out what a barn of that kind would be worth, as any construction man would.

Q. Did you make any notes of your conclusions?

A. No.

Q. When did you first discuss the question of having formed an opinion as to the value of the barn with Mr. Questa or with his attorney or with any one related to them?

A. Just the hired man and I we were referring to.

The Court: He means after this litigation started. Is that what you want to know?

Mr. Levit: Yes.

The Court: When did you first discuss the valuation of the barn?      A. The value?

Q. Yes. A I don't think they ever asked me.

Q. You mean up to the moment you have not been asked as to the value of the barn?

A. No, I have not.

Q. You have not discussed the question of value with Mr. Boyle?      A. Truthfully, no.

Q. Or with Mr. Questa?

(Testimony of John Feurestein.)

A. Mr. Questa referred to it that he thought the barn was worth \$15,000.

Q. Just a moment ago?

A. Just a moment ago.

The Court: You asked him whether he had discussed it?

Mr. Levit: I think you are right.

A. And I told Mr. Questa, I said, "Mr. Questa, if that barn was to be replaced with that type of construction, although it was done before my time——

Mr. Levit: I submit that is not responsive. I asked the witness whether he had talked to Mr. Questa.

The Court: I take it your answer is yes?

A. Yes.

Q. When did you have this conversation with Mr. Qusetta?      A. Saturday.

Q. Last Saturday?      A. Yes.

Q. So that from August, 1941 until last Saturday you had no occasion to either consider or discuss or refer to the question of the value or construction of that barn, isn't that correct? [107]

A. No, I have talked to Mr. Questa before that time, right after the fire, about the barn, but there was no determination of costs or anything of that kind. The part I recall, at one time there was a remark made——

Q. I am not asking about any of the remarks. I am asking you to tell us when you had these conversations. You say now after the fire.

A. Yes, we talked right after the fire was.

(Testimony of John Feurestein.)

Q. And did Mr. Questa at that time question you with regard to your opinion of the value of the barn?

A. No.

Q. He did not?                      A. No.

Q. Did he question you with regard to your opinion as to the reconstruction costs of the barn?

A. I do not recall.

Q. Now that was how soon after the fire, Mr. Feurestein?

A. I imagine it was about 30 days after the fire, the first time I talked to Mr. Questa.

Q. So it was before the first trial of this case, was it not?                      A. I imagine so, I don't know.

Q. Did you, on that occasion, tell Mr. Questa you had been to the barn and seen it about a month before the fire?

A. I told Mr. Questa I had seen the barn.

Q. Did he ask you when?

A. No, at that time he didn't ask me. [108]

Q. So that you had no conversation with him at that time about your visit to the barn?

A. No.

Q. When did you first tell Mr. Questa that you had been to the barn a month before the fire?

A. That I don't know. One thing I can't answer because I can't answer truthfully because for this reason, I don't recall just when and where it was.

Q. How often have you seen Mr. Questa since the fire?

A. Oh, I see Mr. Questa maybe once every two weeks, once a month.

(Testimony of John Feurestein.)

Q. What are your relations other than casual acquaintance? Do you have business dealings?

A. Not at present.

Q. Have you had? A. No.

Q. Ever? A. No.

Q. Never done any work for him?

A. No, I have not.

Q. Purely social? A. Purely social.

Q. Where did you see Mr. Questa?

A. In town, usually around town. Met on the streets different times. When we meet there is no appointment or such, just happen to run into one another. [109]

Q. I take it on these occasions your conversation is purely casual? A. Sure.

Q. And on none of those occasions, up until last Saturday, did Mr. Questa know, as far as you are aware, you had been to the barn a month before the fire? A. Mr. Questa knew before that.

Q. Approximately when did he find that out?

Mr. Boyle: Objected to as calling for conclusion.

The Court: The witness can answer that question. Overruled. A. How is that?

Q. Approximately when did you inform Mr. Questa you had been to the barn and observed it and formed an estimate of its value a month before the fire?

A. That was shortly after the fire I saw him and told him I had been out there and seen the barn.

Q. Did you tell him at that time you had formed an estimate of its value? A. I did not.



(Testimony of John Feurestein.)

Q. You merely told him you had been there and casually viewed the barn?

A. I told him I had seen the barn.

Q. He knew your business? A. Yes.

Q. Did he ask you whether you would be prepared to testify at any time? [110]

A. No, he did not.

Q. He never discussed it with you after that one time? A. No.

Q. When did he first discuss with you the question of your becoming a witness?

A. Saturday.

Q. Last Saturday? A. Last Saturday.

Q. And at that time for the first time Mr. Questa learned that you had an idea of the value of the barn, is that right? A. I presume so.

Q. That was the first time when he learned that you had had anything more than a casual observation of it, is that right?

A. No, I think he knew before that time. Anyway, he knew I had observed the barn before that time.

Q. You say you had been in it before last Saturday? A. Before it burned down.

Q. You were only in it on one occasion however?

A. That is correct.

Q. And he know you had been there on that one occasion? A. Yes.

Q. But prior to last Saturday did he have any knowledge that your knowledge of the barn was anything other than a mere casual passing through?

(Testimony of John Feurestein.)

A. Not that I know of.

Q. Then how did you contact with Mr. Questa last Saturday, go [111] up to him, contact him, or did he contact you? A. Mr. Questa contacted me.

Q. Did he ask you if you knew the value of the barn and would testify?

A. Yes, he asked me whether I was in the barn and if I was sure I was in the barn. If I wasn't sure, he didn't wish me to testify.

Q. And you told him you had been there?

A. Yes.

Q. And that was the first knowledge he had that it was anything more than a casual passing through?

A. Well, I presume so.

Mr. Levit: Well, your Honor, we renew our objection at this time to the witness' testimony, either as to the value or as to reconstruction cost; as to reconstruction cost because the witness does not have a sufficient familiarity with the barn or with this type of construction to qualify him to testify as to reconstruction cost. The witness has testified he himself never built such a barn, never seen such a barn built in his work, it was a type of construction used before he went into contracting.

The Court: I do not think you have to go back and find somebody living in pre-historic days. I will overrule the objection.

Mr. Levit: May I complete my statement?

The Court: Very well. [112]

Mr. Levit: And as to the question of value, that the witness has not been qualified at all as an expert

(Testimony of John Feurestein.)

on values of farm property; that he has been qualified as an expert of certain types of farm property, but not as to value, and in addition I make the same point in regard to his lack of observation.

The Court: The objection will be overruled.

Direct Examination (Continued)

By Mr. Boyle:

Q. Mr. Feurestein, you heard the questions propounded by Mr. Levit when he stated that you only saw wood construction, you heard those questions?

A. Yes.

Q. And you testified yes, you had only seen wood construction. Now if the timbers were of the size that you testified, 8 x 8 and also larger, I believe you said, did you ever see them put together just merely by nails?      A. Oh yes.

Q. But as a matter of fact, aren't they usually put together with long bolts put in on an angle?

Mr. Levit: Objected to as leading and suggestive.

The Court: The witness has already testified to it. I don't think that you have to go over that.

Mr. Boyle: That there were plates, etc.?

The Court: He already said so.

Mr. Boyle: What was that question I asked with relation to value?

The Court: Ask a new one. It will take some time to go back. [113]

Q. Mr. Feurestein, what is your opinion of the value, or what was the value of that barn when you went into it and looked at it? That would be 30 days before the fire or one month before the fire?

(Testimony of John Feurestein.)

Mr. Levit: We object on the grounds he has already stated.

Mr. Boyle: I do not remember asking him.

The Court: Overruled.

A. I would say between 12 and 15 thousand dollars.

Mr. Boyle: You may cross-examine.

The Court: I think counsel has cross-examined on everything except the last question.

Mr. Levit: I was cross-examining only as to observation.

The Court: You make ask any questions you wish.

### Cross-Examination

By Mr. Levit:

Q. Now tell us please approximately how many cubic yards of concrete were there in this barn construction?

A. In that barn there were merely piers in there. I would say there was about 20 cubic yards, if not less.

Q. How many shingles?

A. And shingles, I would say there was about 85 squares of shingles.

Q. What does that mean?

A. Eighty-five squares, that is 4 bunches to the square.

Q. How many thousand, can you put it that way?

A. Well, it would be four times 85—no, 5 bundles to the thousand. [114]

(7) The District Court erred in entering Finding of Fact IX, except that portion of said Finding of Fact which states that supplementary agreements were entered into between the Pacific American Ship-owners' Association and the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association and the Marine Cooks and Stewards Association, dated October 9, 1941, and October 10, 1941, respectively, on the grounds that said finding is immaterial and irrelevant, and not supported by competent evidence.

(8) The District Court erred in entering Finding of Fact X, upon the grounds that the same is immaterial and irrelevant, and that said finding is not supported by competent evidence.

(9) The District Court erred in entering Finding of Fact XI, upon the grounds that the same was immaterial and irrelevant, and that said finding is not supported by competent evidence.

(10) The District Court erred in entering Finding of Fact XII, except that portion of said finding which states that the respondent has paid libelants bonus at the rate of \$80.00 per month from December 7, 1941, to December 29, 1941, upon the grounds that said finding is immaterial and irrelevant and not supported by competent evidence, and contains an erroneous determination of the amount due the libelants.

(11) The District Court erred in entering Conclusions of Law I, II and III.

(12) The District Court erred in entering the Decree awarding each of the libelants the sum of \$288.00.



(13) The District Court erred in failing to enter a decree in favor of the libelant Steeves in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, in failing to enter a decree in favor of the libelant Calgan in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, in failing to enter a decree in favor of the libelant Porter in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, and in failing to enter a decree in favor of the libelant Taylor in the sum of \$2083.67, together with interest thereon at the legal rate from December 7, 1943, and costs in favor of the libelants.

(14) The District Court erred in admitting in evidence respondent's Exhibit "K" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit was a document entitled "Statement of Principles," and was adopted at a conference of representatives of steamship companies and maritime unions held in Washington, D. C., December 19, 1941. This exhibit, in substance, provided that it was desirable and necessary that a uniform basis of war bonus and insurance covering the entire maritime industry be reached; that maritime labor give its assurance to the United States Government that they will not strike during the period of war; and steamship companies agree there will be no lock-out; that the utilization of collective bargaining will not be impaired by reason of any act of the conference; that all agreements and

obligations arising out of collective bargaining will not be violated; to provide machinery for the settlement of disputes without interruption of service or stoppage of work during the period of war, and to insure application of the maximum war effort; providing for the creation of a proposed maritime war emergency board with the powers set forth in Exhibit "A" attached to said exhibit. Exhibit "A" attached provides that the unions and the vessel operators, having pledged themselves to co-operate in the war effort, it is of importance that means shall be established to insure that questions that may arise which are likely to interrupt the war effort, shall be settled promptly.

Under present conditions, in order to afford a procedure for settling questions relating to war risk compensation and insurance it is proposed there shall be established a board to be known as the Maritime War Emergency Board, which shall consist of three members named by the President. Disputed questions of war risk compensation shall be referred to the Board, and upon notice and hearing, its decision shall be final. Advisory committees of steamship operators and unions are set up. Pursuant to this agreement, on December 19, 1941, President Roosevelt appointed John R. Steelman, Edward Macauley and Frank P. Graham to constitute the Maritime War Emergency Board.

(15) The District Court erred in admitting in evidence respondent's Exhibit "A-5" over libelants' objection that the same was immaterial and irrelevant.

Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-5" was a document dated October 10, 1941, being a supplementary agreement between the Master, Mates and Pilots Association, West Coast Local 90 (representing licensed deck officers), and the Pacific Shipowners Association. This agreement designated the war areas and provided for payment to members of the Masters, Mates and Pilots Union of war bonus, at designated rates, and for the payment of bonus during such time as the members of the union were in the war zone. None of libelants were members of this union.

(16) The District Court erred in admitting in evidence respondent's Exhibit "A-6" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-6" was a document dated October 15, 1941, being a supplementary agreement between the Marine Engineers Beneficial Association (the union representing the licensed engineer officers), and the Pacific Shipowners Association. This agreement designated the war areas and provided for the payment of the war bonus, at designated rates, and for the payment of bonus during such time as the members of the Association were in the war zone. None of the libelants were members of this Association.

(17) The District Court erred in admitting in evidence respondent's Exhibit "A-7" over libelants' objection that the same was immaterial and irrelevant.

Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-7" was a document dated October 16, 1941, being a supplementary agreement between the American Communications Association representing the radio operators and the Pacific Shipowners Association. This agreement designated the areas and provided for the payment of the war bonus, at designated rates, and for the payment of bonus during such time as the members of the Association were in the war zone. None of libelants were members of this association.

(18) The District Court erred in admitting in evidence respondent's Exhibit "A-8" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-8" was a document dated October 9, 1941, being a supplementary agreement between the Sailors' Union of the Pacific and the Pacific Shipowners' Association. This agreement designated the war areas and provided for the payment of war bonus during such time as the members of the S. U. P. were in the war zone. None of the libelants were members of the S. U. P.

(19) The District Court erred in admitting respondent's Exhibit "A-10" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Respondent's Exhibit "A-10" was a copy of Decision No. 2 of the Maritime War Emergency Board, dated January 10, 1942, containing classification of



bonus areas and the rate of bonus. Six classifications were established with appropriate bonus rates, and also providing for the payment of certain port bonuses. Nothing in this exhibit relates to the payment of bonus during internment.

(20) The District Court erred in admitting respondent's Exhibit "A-11" over libelants' objection that it was immaterial and irrelevant, which objection was overruled, and exception allowed.

This exhibit is Decision No. 5 Revised of the Maritime War Emergency Board, dated February 1, 1942, requesting that all persons in possession of the previous Decision No. 5, and the supplements hereinafter referred to as Respondent's Exhibit "A-12," destroy the same, and this revised Decision No. 5 sets forth the new procedure whereby the owner or operator of the vessel shall pay the dependents of seamen during internment the amounts which have been allotted to said dependents. This Revised Decision No. 5 provides that it is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the payments provided for or contained in the ship's articles entered into on or before February 21, 1942, with respect to payment of bonus during internment, or where the making of such payments was expressly left open subject to a later agreement either in the ship's articles or collective bargaining. This decision substantially follows Exhibit "A-12" in that it sets forth the procedure of payment of wages to either the members of the crew or their dependents during the period of internment, and provides similarly that war bonus shall continue from the time of the loss of the



Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-7" was a document dated October 16, 1941, being a supplementary agreement between the American Communications Association representing the radio operators and the Pacific Shipowners Association. This agreement designated the areas and provided for the payment of the war bonus, at designated rates, and for the payment of bonus during such time as the members of the Association were in the war zone. None of libelants were members of this association.

(18) The District Court erred in admitting in evidence respondent's Exhibit "A-8" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

Respondent's Exhibit "A-8" was a document dated October 9, 1941, being a supplementary agreement between the Sailors' Union of the Pacific and the Pacific Shipowners' Association. This agreement designated the war areas and provided for the payment of war bonus during such time as the members of the S. U. P. were in the war zone. None of the libelants were members of the S. U. P.

(19) The District Court erred in admitting respondent's Exhibit "A-10" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Respondent's Exhibit "A-10" was a copy of Decision No. 2 of the Maritime War Emergency Board, dated January 10, 1942, containing classification of

bonus areas and the rate of bonus. Six classifications were established with appropriate bonus rates, and also providing for the payment of certain port bonuses. Nothing in this exhibit relates to the payment of bonus during internment.

(20) The District Court erred in admitting respondent's Exhibit "A-11" over libelants' objection that it was immaterial and irrelevant, which objection was overruled, and exception allowed.

This exhibit is Decision No. 5 Revised of the Maritime War Emergency Board, dated February 1, 1942, requesting that all persons in possession of the previous Decision No. 5, and the supplements hereinafter referred to as Respondent's Exhibit "A-12," destroy the same, and this revised Decision No. 5 sets forth the new procedure whereby the owner or operator of the vessel shall pay the dependents of seamen during internment the amounts which have been allotted to said dependents. This Revised Decision No. 5 provides that it is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the payments provided for or contained in the ship's articles entered into on or before February 21, 1942, with respect to payment of bonus during internment, or where the making of such payments was expressly left open subject to a later agreement either in the ship's articles or collective bargaining. This decision substantially follows Exhibit "A-12" in that it sets forth the procedure of payment of wages to either the members of the crew or their dependents during the period of internment, and provides similarly that war bonus shall continue from the time of the loss of the

vessel until the seaman arrives at the port where he is no longer exposed to marine perils, and is subject to the retroactive provisions hereinabove set forth.

(21) The District Court erred in admitting respondent's Exhibit "A-12," to which libelants objected on the ground that the same was immaterial and irrelevant, which objection was overruled, and exception allowed.

Exhibit "A-12" was denominated Maritime War Emergency Board Decision No. 5, and supplements. This exhibit sets forth the procedure whereby an owner or operator of a vessel, sunk by enemy action, shall pay to the seaman, or his dependents, wages and allotments during internment of the seaman. It defines certain classes of dependents which shall receive such allotment in the event no allotment has been made by the seaman. Supplement dated February 6, 1942, provides that the Decision shall be retro-active to December 7, 1941, and further provides that the seaman shall have the right to agree with the ship owner that such seaman shall be paid wages during the period of internment, through the medium of the American Red Cross, or other governmental agency. Amendment to Decision No. 5, also part of this exhibit, dated February 17, 1942, re-states that Decision No. 5 clearly covers vessels in the American Merchant Marine which are sunk or damaged by enemy action, or the destruction of such vessel by any of the United Nations. This amendment sets forth that the Board has given consideration to the continuance of bonus in case of destruction of the vessel, which subject was not covered by Decision No. 5, and adds a number of articles to



Decision No. 5, designating the same as Article No. 6, and providing that where such vessel is lost as the result of enemy action, the war bonus shall continue at the rate which prevailed immediately before loss until the seaman arrives at a port where he is no longer exposed to marine perils. This further provides, however, that the provision of the supplement to Decision No. 5 providing that the terms of the decision shall be retro-active to December 7, 1941, shall be applicable only where there was no agreement with respect to the making of payments provided for or contained in the ship's articles entered into on or before January 10, 1942.

(22) The District Court erred in admitting in evidence respondent's Exhibit "B," Mullins' Deposition over objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Exhibit "A," Mullins' Deposition, was a written proposal by the Masters, Mates and Pilots Association and the Marine Engineers' Beneficial Association, submitted to a conference called by the United States Maritime Commission and the Department of Labor in July and August, 1941, between the American Merchant Marine Institute, representing the Atlantic coast vessels, and the Pacific-American Shipowners' Association, representing the Pacific coast vessels, and the two unions above referred to. This proposal sets forth their demands for bonus in various war areas and the proposed war risk insurance policies covering their members.

(23) The District Court erred in admitting in evidence respondent's Exhibit "B," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit was the agreement entered into on August 16, 1941, between the Marine Engineers' Beneficial Association and the Masters, Mates and Pilots Association and the American Merchant Marine Institute and the Pacific American Shipowners' Association covering the proposed bonuses and wages for the war risk areas defined therein. This exhibit also included a copy of a letter from Admiral Land to Mr. Frank J. Taylor, President of the American Merchant Marine Institute, dated July 22, 1941, calling a conference. The exhibit further included the opening remarks by Admiral McCauley to the members of the conference at the time of their meeting on August 12, 1941, and a request by them to further the war effort.

(24) The District Court erred in admitting Exhibit "C," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. This objection was overruled, and exception allowed.

This exhibit was a form letter from the Secretary of the American Merchant Marine Institute, dated August 18, 1941, addressed to its members, advising them of the result of the meetings with the Masters, Mates and Pilots and Marine Engineers, and the negotiations and agreements entered into between them.

(25) The District Court erred in admitting Exhibit



"D," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a copy of the decision of the National Defense Mediation Board Decision No. 80 of hearings held on September 29th and October 1st, 2nd, 3rd and 4th, 1941, in which the American Merchant Marine Institute, Pacific American Ship-owners Association, Waterman Steamship Corporation, parties on the one side, and the Seafarers' International Union of N. A. and the Sailors' Union of the Pacific were opposing parties. This resulted in certain recommendations by the Board, which, in substance, were as follows: That the crews of American vessels perform an essential role in the national war effort, and that a number of named shipping companies are associated in the American Merchant Marine Institute and the West Coast companies are associated in the Pacific American Shipowners' Association, and the Waterman Steamship Company is not affiliated with either group; that the unlicensed personnel are represented by the S. I. U. and the S. U. P.; that collective bargaining relationships have been established by most owners and one or another of the unions, and for the negotiation of general contract the parties have worked out among themselves appropriate methods. However, a special problem arises from the risk run by men who go to sea in time of war, and it was with this problem that the recommendations are concerned. To cover the bonus which would be fair under present conditions and provide machinery for equitable future bonus, if conditions change, the National Defense

Mediation Board recommends, until changed, bonus rules based on five war risk areas as defined therein, with a further provision that able-bodied seamen shall be paid a bonus of \$80.00 per month in the first four areas and \$33.00 a month in the fifth area. The fourth area covers the trans-Pacific route. Provision is also made for port attack bonuses. The Board further recommends the following machinery for making equitable future adjustment: Any signatory may ask for a change, such request to be made in writing to the other party for whom change is sought, and if an agreement is not reached within one week, the matter be referred to the United States Department of Labor, Division of Conciliation; if not then determined, it may be referred to a Board composed of three members appointed by the President, and such Board shall have power to make recommendations. It further provides that the recommendations relating to the bonus areas shall be effective to November 1, 1942, and that an amendment to November 1, 1943, and during this period there shall be no strike. It is further set forth that nothing in these recommendations shall be interpreted to reduce benefits now existing under collective bargaining contracts, and all the recommendations shall become effective on ships that sail after August 16, 1941, or any earlier effective date set by special rider. If any dispute arise as to the interpretation or recommendations and the parties cannot adjust that dispute by collective bargaining, either party may avail themselves of the arbitration conciliation provisions provided in the recommendations.

(26) The District Court erred in admitting Exhibit "E," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a blank form of supplementary agreement between the National Maritime Union and the name of the company left in blank, bearing date November 6, 1941, which set forth the bonus areas and the rates of bonus.

(27) The District Court erred in admitting Exhibit "F," Mullins' Deposition, over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a supplementary agreement in blank between the National Maritime Union and unnamed companies, bearing date December 12, 1941, concerning bonus areas and bonus rates.

(28) The District Court erred in admitting respondent's Bryan Deposition-Exhibits "A," "B" and "D" over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Bryan Deposition-Exhibits "A," "B" and "D" are the same documents heretofore referred to as Mullins' Deposition-Exhibits "A," "B" and "D," respectively.

(29) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "G" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled and exception allowed.

This exhibit was the written counter-proposal, dated August 12, 1941, made by the Pacific American Shipowners' Association and American Merchant Marine Institute to the demands of the two unions representing the licensed personnel, which negotiations and conference resulted in a contract heretofore referred to as Respondent's Exhibit "B." These proposals defined the various war risk areas and the bonuses to be paid, and provided for a \$5000.00 war risk insurance for loss of life. This proposal suggested the payment of wages during the period of internment until the officer arrives at a Continental United States port.

(30) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "H" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

Bryan Deposition-Exhibit "H" was the war bonus proposal of the Pacific Coast Marine Firemen, Wartetenders and Oilers' Association, dated September 15, 1941, setting forth proposed war bonus areas and the rates to be paid in those areas, requesting war risk insurance, and requesting payment of wages and bonuses in the event of internment until the men arrived at a continental United States port. Requests were also made for insurance on personal effects and for certain meal benefits while awaiting transportation.

(31) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "I" over libelants' objection that it was immaterial and irrelevant. Li-



belants' objection was overruled, and exception allowed.

This exhibit is a copy of a letter from the Sailors' Union of the Pacific, dated September 10, 1941, directed to the Pacific American Shipowners' Association, setting forth their reasons for a proposed amendment to the current war bonus provisions and submitting certain bonus demands covering particular areas, including a request for the payment of bonus until the member of the union is returned to a home port, and also requesting certain war risk insurance on personnel and property of personnel, as well as increased wages by reason of carrying war cargo.

(32) The District Court erred in admitting in evidence Bryan Deposition-Exhibit "J" over libelants' objection that it was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

This exhibit is a letter from the Marine Engineers' Beneficial Association, dated October 24, 1941, directed to the American Merchant Marine Institute, calling attention to certain differences in the bonus provisions in the agreements entered into on the Atlantic Coast between the Marine Engineers' Beneficial Association and the American Merchant Marine Institute and the Pacific American Shipowners' Association on the Pacific Coast.

(33) The District Court erred in admitting the testimony of the witness Mullins by deposition over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, to which libelants excepted, and exception allowed.

The witness Mullins testified that he was secretary of the American Merchant Marine Institute which is composed of vessel operators of the Atlantic Coast, and that as such he participated in and identified the documents hereinabove referred to in connection with the negotiations conducted between the American Merchant Marine Institute and the National Maritime Union, such negotiations taking place prior to the execution of the shipping articles and rider under which the libelants were employed. The witness also identified and testified concerning the letters written by the American Merchant Marine Institute to its members advising them of the result of the negotiations. He identified National War Labor Mediation Board Decision No. 80, and testified concerning the hearings.

(34) The District Court erred in admitting in evidence the testimony of the witness J. B. Bryan by deposition over libelants' objection that the same was immaterial and irrelevant. Libelants' objection was overruled, and exception allowed.

The witness Bryan testified that the Pacific American Shipowners' Association, formed in 1936, acted in labor relations matters between its members and seafaring unions; that commencing in 1939, collective bargaining agreements contained special settlement of war bonus; that because of confusion arising between separate agreements entered into by the various companies following a series of conferences held in Washington, D. C., a uniform agreement with the unions representing the licensed personnel was entered into. Bryan participated in these negotiations,

which were preceded by written demands made by these two unions, which he identified and which were admitted as above set forth. He also identified the same documents testified to by William Mullins in his deposition. He identified the written demands made by the Radio Operators Association, and demands made by the Sailors' Union of the Pacific dated September 16, 1941. He testified concerning the hearing in Case No. 80 before the National Defense Mediation Board covering the general subject matter of war risk and war bonus, which hearing was held in October, 1941, and which resulted in certain written recommendations by the Board. He identified the dates upon which supplementary agreements were entered into between the Pacific Shipowners' Association and the six unions representing sea-going personnel, and testified concerning communications between the Pacific Shipowners' Association and the American Merchant Marine Institute about the possible differences in the language of the contracts, and identified a letter dated October 24, 1941, referred to in Bryan Deposition-Exhibit "J" concerning such differences.

EDWARD J. STEEVES,  
HUGO CALGAN,  
WILLIAM A. PORTER,  
SAMUEL S. TAYLOR,  
Appellants,

By SAM L. LEVINSON,  
Their Proctor.

[Endorsed]: Filed June 15, 1945.





No. 11100

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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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EDWARD J. STEEVES, HUGO CALGAN, WILLIAM  
A. PORTER and SAMUEL S. TAYLOR,

*Appellants,*

vs.

AMERICAN MAIL LINE LTD., a corporation,  
*Appellee.*

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UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION.

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BRIEF OF APPELLEE  
AMERICAN MAIL LINE LTD.

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FILED

1945

JOHN AMBLER,

GROSSCUP, AMBLER & STEPHAN,

*Proctors for Appellee.*

PAUL P. O'BRIEN  
CLERK

807 Central Building,  
Seattle 4, Washington.



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JOHN AMBLER,  
GROSSCUP, AMBLER & STEPHAN,  
*Proctors for Appellee.*

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IN THE  
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EDWARD J. STEEVES, HUGO CALGAN, WIL-  
LIAM A. PORTER and SAMUEL S. TAYLOR,  
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tion, *Appellee.*

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No. 11100

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, NORTHERN DIVISION.

---

BRIEF OF APPELLEE  
AMERICAN MAIL LINE LTD.

---

INTRODUCTORY FACTS\*

The American Steamship "CAPILLO" was a vessel owned by the United States Maritime Commission. In 1941 she was under bareboat charter to American Mail Line Ltd., and was operated by that company in the trans-Pacific cargo trade between North American Pacific Coast ports and the Philippine Islands via various Oriental ports.

On October 11, 1941, the master of the "CAPILLO" signed Shipping Articles with his crew at Portland,

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\* All emphasis in quotations, unless otherwise indicated, is supplied. References in (....) are to pages in Apostles on Appeal.

Oregon, for a customary voyage. Just before the vessel sailed from the mouth of the Columbia River on her projected voyage, her routing, due to unsettled conditions in the Pacific, was unexpectedly assumed by the United States Navy. She was ordered to proceed direct to Honolulu, T. H., and from there via a circuitous course direct to Manila, P. I., thus omitting her scheduled calls in China. The vessel in compliance with Navy orders arrived at Manila November 28, 1941. Unable to discharge her cargo, she remained in that port under orders of the United States Government until December 29, 1941, when she was sunk by bombs from Japanese aircraft (35,36, 81). Fortunately her crew suffered no casualty, but soon thereafter they were interned by the Japanese.

The appellants, two oilers, a fireman and a messman, of the crew of the "CAPILLO," after interment near Manila and Shanghai, China, were repatriated to the Port of New York, N.Y., on the second voyage of the International Exchange Motorvessel "GRIPSHOLM," arriving in New York December 2, 1943 (48, 81). The appellants were immediately paid the following:

1. Basic wages and "emergency increase" from October 11, 1941, to December 2, 1943:<sup>1</sup>

Steeves and Calgan, oilers,	
at \$110.00 per mo. each	\$2830.67
Porter, fireman,	
at \$100 per mo.....	2573.33
Taylor, messman,	
at \$87.50 per mo.....	2251.67

---

<sup>1</sup>These several terms were thus defined by Mr. Williams, a witness for appellee:

"Q The term will later be used 'basic wages.' Will you state what that term means?

2. War bonus November 2, 1941, date vessel crossed 180th Meridian, west-bound, to December 29, 1941) at \$80 per month, each ..... \$ 154.66
  3. Port bonus, each ..... 125.00
  4. Loss personal effects, each ..... 150.00
- with usual appropriate governmental deductions.

Each appellant was likewise paid his own estimate as to overtime wages earned during the voyage, ranging from \$68 to \$116.45 (135, 136, 269).

### RECOVERY SOUGHT BY AMENDED LIBEL

Appellants *each* seek in this action:

- (a) War bonus from the date of the destruction of the vessel until his arrival on the Pacific Coast of the United States (December 29, 1941, to December 7, 1943) at \$80 per month ..... \$1858.67
  - (b) Transportation from New York to Pacific Coast ..... 125.00
- 
- Total ..... \$1983.67
- (21, 22)

---

A The basic wages was the wages agreed upon in the original agreement which was negotiated in the fall of 1939.

Q Will you state what is meant by the term 'emergency increase'?

A Emergency increase was an increase to the base wage.

\* \* \* \* \*

Q Now, will you state what was meant by the term 'bonus'?

A Bonus was an agreed sum of money to be paid for the additional dangers of going into dangerous waters and war zones." (112, 113, see also 185, 186)

## RECOVERY ALLOWED BY TRIAL COURT

Appellants *each* were allowed by the District Court:

(1) Increased war bonus (December 7, 1941, to December 29, 1941) at the rate of \$100 per month under Decision No. 2 of Maritime War Emergency Board, each .....	\$ 14.69
(2) War bonus during repatriation <i>voyage</i> of M/S "GRIPSHOLM" at the rate of \$100 per month, under practice established for seamen repatriated on that vessel by Maritime War Emergency Board, <sup>2</sup> each .....	273.33
Total .....	\$ 288.02
(48, 49)	

## THE SHIPPING ARTICLES OF THE "CAPILLO"

The Shipping Articles of the vessel, except for a Rider, are in usual form providing for a voyage from Portland, Oregon, to Shanghai and Hong Kong, China; thence to the Philippine Islands and back to the Pacific Coast of the United States for a term not to exceed six months. The Shipping Articles contain no reference of any kind to war bonus or other war compensation except in a Rider (Original Exhibit A-2).

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<sup>2</sup>War bonus during repatriation *voyage* was originally declined because *war risk* on the Motorvessel "GRIPSHOLM," operating under International protection, did not appear to be sufficient to warrant payment of war bonus. However, the practice of paying repatriation war bonus to seamen repatriated on the M/V "GRIPSHOLM" was established by the Maritime War Emergency Board (48).



## THE RIDER TO THE SHIPPING ARTICLES

The dispute in this case centers upon the interpretation of a Rider to the Shipping Articles of the "CAPILLO," reading as follows:

"The American Mail Line *agrees to pay an emergency war bonus* to the crew of the 'S. S. CAPILLO,' Voyage 6, *in accordance with provisions* contained in the *Applicable Supplementary Agreements* in effect between the Pacific American Shipowners' Association and the various marine unions.

"In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and *bonus* to the date members of the crew arrive in an United States port, on the Pacific Coast: Furthermore, the Company agrees, in such event, to arrange for repatriation of such men to an United States port, on the Pacific Coast. Also, that the Company be liable for any injuries suffered by any crew member due to war causes.

"The Company agrees to reimburse each man so affected by the amount of \$150.00 in the event of loss of personal effects by any member of the crew due to necessity of abandoning the ship resulting from torpedoing, mining, bombings, shelling, scuttling or any other war causes, which results in the ship wreck of the vessel.

"The Company also agrees to carry war risk insurance in the amount of \$2,000.00 for each member of the crew, against loss of life as a result of war perils.

"It is further agreed that in the event of any *increase in pay, overtime or war bonus*, which

may be granted, as the result of negotiations between the Union and the Pacific American Ship-owners' Association, the Company will be *governed by the terms and effective date* of any agreement so reached.

/s/ GALE T. BLUNDELL,

Deputy U. S. Shipping Commissioner.

/s/ K. O. DRYER,

Master" (31, 36)

We might observe at this point that *without* such a Rider or other corresponding special agreement the further obligation of the operator to the crew of a vessel, whether for wages, bonus, lost effects or repatriation, is *terminated* by her loss or interment.

"An embargo neither destroys nor suspends the right to wages, if the voyage be afterwards completed, or a new one be substituted for it. But if the embargo is never remitted, that is, *if it be in fact a seizure or arrest, and if the voyage is broken up by it without the fault of the owner or his servants, then it puts a stop to the claim for wages*, like any other extraordinary termination of the voyage. \* \* \*"

Parsons on Shipping and Admiralty, Vol. 2,  
p. 63.

*Saratoga*, Fed. Cas. 12,355;

*Horluck v. Beal* (1916) A.C. 486;

*The Edna*, 291 Fed. 379;

*The Edna*, 292 Fed. 640;

*Alaska S.S. Co. v. U.S.*, 290 U.S. 256;

*American Mail Line v. U.S.*, 59 F. Supp.  
921;

46 U.S.C. 593.

We give below the salient testimony introduced by

appellee. Appellants introduced no testimony and relied on admissions of appellee.

### THE ORIGIN OF THE RIDER

The exact form of Rider used on the "CAPILLO" was prepared by the unions in early August, 1941, and was presented at Portland, Oregon, to American Mail Line Ltd. for use on its vessels (46, 106, 109). It was *first* used on Shipping Articles of a vessel of American Mail Line Ltd., dated August 13, 1941 (107). The Shipping Articles of the "CAPILLO" were the fourth on which the Rider had been used (106).

### "AGREEMENTS" AND "SUPPLEMENTARY AGREEMENTS" MENTIONED IN THE RIDER

For some years prior to 1941 collective bargaining agreements covering wages, other compensation and working conditions on principal American vessels operating from the ports of the Pacific Coast, including the vessels of American Mail Line Ltd., had been negotiated for the vessel operators by Pacific American Shipowners' Association and for the various departments of the crew by the following six maritime unions (37, 38, 85, 86, 99, 100, 153, 188, 189, 190):

Masters, Mates and Pilots of America, West Coast Local No. 90

Marine Engineers Beneficial Association

American Communications Association (Marine Division)

Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association

Marine Cooks and Stewards Association of the Pacific Coast

Sailors' Union of the Pacific.

Appellants Steeves, Calgan and Porter belonged to the "Marine Firemen." Appellant Taylor belonged to the "Marine Cooks" (Appellant's brief 25, 29).

In 1940 the Association undertook to establish general standards of *war compensation* through general agreements with each union on a *uniform* basis. Prior to that time the subject of war compensation had been a matter of individual negotiations between a shipowner and a particular union or unions (39, 87, 88, 89, 188, 189).

The American Merchant Marine Institute, Inc., on the Atlantic Coast performed a similar function for principal operators of vessels on the Atlantic Coast (41, 42, 86, 161, 162).

### BASIC AGREEMENTS

On August 13, 1941, when the Rider was first used, "Agreements" were in effect between the Pacific American Shipowners Association and the six unions covering so-called "basic" wages and general working conditions dated as follows:

Master, Mates and Pilots	December 30, 1939
Marine Engineers	May 1, 1940
American Communications	July 13, 1940
Marine Firemen	October 7, 1939
Marine Cooks	July 5, 1940
Sailors' Union	October 10, 1939

(130)



## SUPPLEMENTARY AGREEMENTS

On August 13, 1941, when the Rider was first used on a vessel of American Mail Line Ltd., there had been three so-called Supplementary Agreements adopted between the parties providing for trans-Pacific voyages as follows:

### First Supplementary Agreements of 1940

Masters, Mates, May 2, 1940, providing in part:

1. "Emergency Increase" of 10% of "basic" wages.
2. *War bonus of 25% of "basic" wages from arrival of vessel at first Japanese port westbound until its departure from last Japanese port eastbound.*

Marine Engineers, May 1, 1940, same provisions.

Marine Cooks, July 5, 1940, providing in part:

1. Emergency increase of 10% of "basic" wages for those earning over \$100 a month.

Flat \$10 a month for those earning under \$100 a month.

2. *War bonus of 25% of "basic" wages from arrival of vessel at first Japanese port westbound until its departure from last Japanese port eastbound.*

Marine Firemen, April 30, 1940, same provisions.

Sailors' Union, April 30, 1940, same provisions (39, 131).

### Second Supplementary Agreements of February 10, 1941

Masters, Mates, February 10, 1941, providing in part:

1. "Emergency increase" increased to 15% of "basic" wages.
2. War bonus of 25% of "basic" wages *and* emergency increase *from the crossing of 160th Meri-*



*dian westbound until recrossing 160th Meridian eastbound.*

Marine Engineers, February 10, 1941, same provisions.

Marine Cooks, February 10, 1941, providing in part:

1. Emergency increase of 15% of "basic" wages to those earning over \$120 per month.  
Flat \$17.50 to those earning under \$120 per month.
2. War bonus of 25% of "basic" wages and emergency increase to those earning over \$120 per month, and  
Flat \$30 per month to those earning under \$120 per month.

*From crossing of 160th Meridian westbound until recrossing 160th Meridian eastbound.*

Marine Firemen, February 10, 1941, same provisions.

Sailors' Union, February 10, 1941, same provisions (39, 132).

### **Third Supplementary Agreements of May 19, 1941**

Marine Engineers, May 19, 1941, providing:

1. War bonus of 50% of "basic" wages *from the crossing of the 160th Meridian westbound to recrossing 160th Meridian eastbound.*
2. War risk insurance \$2,000.

American Communications Association, May 19, 1941, same provisions.

Marine Cooks, May 19, 1941, providing:

1. War bonus of 50% of "basic" wages to those earning above \$120 per month.  
Flat \$60 per month to those earning under \$120

per month, from the crossing of the 160th Meridian westbound to recrossing 160th Meridian eastbound.

2. War risk insurance \$2,000.

Marine Firemen, May 19, 1941, same provisions.

Sailors' Union, May 19, 1941, same provisions (40, 132, 133).

A corresponding Third Supplementary Agreement had *not* been made with the Masters, Mates and Pilots (132).

#### STATE OF NEGOTIATIONS ON NEW SUPPLEMENTARY AGREEMENTS UNKNOWN TO PARTIES WHEN "CAPILLO" SAILED

On October 11, 1941, when the Shipping Articles of the "CAPILLO" were signed this situation was unchanged in so far as the parties here are concerned. They *knew* of no Supplementary Agreement *later* than those of *May 19, 1941* (46, 112, 145, 149). This is the undisputed testimony and is corroborated by the fact that the Rider on the Shipping Articles of the "CAPILLO" was prepared in early August, 1941, and refers to the war risk insurance of \$2,000.00 as provided in the Supplementary Agreements of May 19, 1941 (32, 37).

It will be *particularly* observed that there were *no* supplementary agreements known to the parties in early August, 1941, *or* on October 11, 1941, covering the following:

1. Compensation to be paid members of the crew after a vessel was lost or interned and so unable to continue her voyage due to war causes.

2. Repatriation of the crew in such event.

3. Loss of personal effects in such event (146, 147, 148, 149).

As indicated, without *specific* agreement, seamen would have no rights on these subjects. The emphasis had been on *amount* of bonus. Loss or interment of a vessel seemed remote.

However, in that period, between August and October, 1941, much had occurred in negotiations between the representatives of the operators and the unions in regard to such war compensation. The first and last paragraph of the Rider made such later developments in negotiation a part of the Shipping Articles (98, 154).

## **DEVELOPMENTS IN COLLECTIVE BARGAINING ON WAR COMPENSATION FOLLOWING EXECUTION OF SUPPLEMENTARY AGREEMENTS OF MAY 19, 1941**

Subsequent to the execution of the Supplementary Agreements of May 19, 1941, covering war compensation, unrest and dissatisfaction continued in the matter of *war compensation*, not only between operators and the unions, but particularly between unions, each attempting to work out a more advantageous arrangement for its own membership. Particularly keen rivalry arose between Pacific Coast and Atlantic Coast unions on this subject (40, 189). Many and serious work stoppages resulted. To remedy this condition the United States Maritime Commission and the Department of Labor called conferences of Atlantic Coast and Pacific Coast operators and unions in July and

August, 1941 (40, 89, 165, 190). The following call for this conference was issued, signed by the Chairman of the United States Maritime Commission:

"July 22, 1941

"Mr. Frank J. Taylor, President  
American Merchant Marine Institute, Inc.  
11 Broadway  
New York, New York

"Dear Mr. Taylor:

"A series of conferences are being called on August 12, August 15, and August 19, 1941, between representatives of sea-going organized labor and offshore steamship operators for the purpose of affording these representatives an opportunity of reaching a *decision* covering the payment of *war bonuses* on a *national uniform basis*.

"These conferences will be held under the auspices of the Department of Labor and the Maritime Commission, and will take place in Room 7856 of the Department of Commerce Building, at 10:00 A.M., on the dates mentioned above. The first conference, on August 12, will be devoted to the question of war bonuses as they affect licensed and registered officers; on August 15, as they affect radio operators; and on August 19, as they affect unlicensed personnel.

"This letter constitutes a formal invitation for your association to be represented and participate in these deliberations.

"As the executive officer of your association, the designation of your representatives will be left to your discretion, but it is hoped that in such designation you will have in mind the benefits to be derived from a small but adequate representation.



"Will you advise me of your acceptance of this invitation, as well as of the names of those who, with you, will represent your organization.

"A communication identical to this is being sent to Mr. A. O. Woll, Secretary of the Pacific American Tank Ship Association, and to Mr. J. B. Bryan, *President of the Pacific American Ship-owners Association*. If you think it is desirable that invitations be sent to others than those mentioned herein, will you kindly advise me to that effect.

Sincerely yours,  
(Signed) E. S. LAND

E. S. Land, Chairman"  
(40-41, 219-220)

Similar letters were sent to all interested parties.

The conferences opened in Washington, D. C., on August 12, 1941, with the following introductory remarks by Commissioner Macauley of the United States Maritime Commission:

"As you know from the letters inviting you to be present, this conference between representatives of the licensed officers' organizations and representatives of the off-shore steamship operators is being held under the auspices of the Department of Labor and the U. S. Maritime Commission, in order to permit these representatives an opportunity to present to the Department of Labor and the Maritime Commission their views as to the determination of a proper *national uniform basis* for payment of *war bonuses* to the licensed officers of American Merchant ships.

"It is desired that this conference be *confined strictly* to the purpose for which it has been called, i.e., to achieve a *nationwide agreement on war risk compensation*. It is considered that *other subjects*, such as wages, hours and working condi-

tions, are extraneous and *not pertinent* to the discussion.

"It is also desired that any agreement reached should be final and binding on all parties and independent of any existing or future agreements as to basic wage scales and working conditions.

"It is not contemplated that a single rate for all of the various services, regardless of the destination of the vessels, should be put into effect, but rather that *in each danger area* the rates should be uniform regardless of the port of original departure.

"The agreement arrived at should *remain* in force *except* in one of the following events:

- (a) *Declaration of war* by or against the United States.
- (b) Change of danger or combat zones proclaimed by the President of the United States.
- (c) Abolition of all *danger zones* as may be anticipated on the cessation of hostilities between the warring countries.

"In either of the first two contingencies, *similar conferences* shall be called by the Maritime Commission and the Department of Labor, to *re-examine* the question of war bonuses.

"If a basic formula for future action is worked out, provision should be made to take care of the compensation to be paid in a new area on the same relative basis as is prescribed for existing areas under the general formula.

"The Commission does not desire to prescribe the agreement to be arrived at, but does insist that the scope of the discussion be confined to the subject of war bonuses. The Commission urges that this matter be settled as speedily as possible,

in a spirit of fairness and cooperation, so that the result may not only be a mutually satisfactory and agreeable working arrangement, but an urgent and important contribution to the National Defense." (42, 221-223)

## THE AUGUST CONFERENCE AND NEGOTIATIONS

A contract between *operators* on both Coasts and *licensed* personnel in the Deck and Engine Departments covering war compensation was first considered at the Conference (43, 166, 190). Joint demands had been presented by the licensed officers, i.e., Masters, Mates and Pilots and the Marine Engineers. As applicable to this case, these demands were (166, 167):

1. War bonus of 100% of wages for the "entire voyage" on vessels going to the "Far East." Other rates were suggested for other "voyages," and a bonus rate for certain ports.
2. Loss of personal effects, \$500.
3. Repatriation to port of "*signing on*."
4. If the vessel be lost or interned, wages, emergency wages *and* war bonus to be paid licensed officers "*until and including the date of their arrival in a port of the United States*."
5. War risk insurance, \$10,000 (209-212).

On August 12, 1941, American Merchant Marine Institute, Inc., and Pacific American Shipowners Association made a *counter-proposal* suggesting six so-called "Danger Zones," with accompanying bonus "payable for voyages to *above defined zones*" including:

"ZONE IV Transpacific *voyages* to Japan, Philippine Islands, China, Indo-China, East Indies and Malayan Peninsula."

The Associations likewise counter-proposed the following:

1. In Zone IV 50% of basic wages and emergency increase "from crossing of the 160th Meridian of East Longitude westbound, until crossing the same Meridian eastbound."
2. Loss of personal effects, \$300.
3. Repatriation to a "*Continental United States Port.*"
4. If the vessel be lost or interned, *wages and emergency increase* to the date licensed officers *arrive in a continental United States port*, and war bonus "*while the men are in the Danger Zones described above.*"
5. War risk insurance, \$5,000 (192, 242-244).

After further negotiations a joint contract between the two Associations and the two unions representing licensed deck and engine room personnel was effected dated August 16, 1941 (43, 167, 190, 191, 213-223).

### THE CONTRACT OF AUGUST 16, 1941

This contract is a major factor in this discussion and the date is important. It will be noted that it is dated three days after the Rider was first *used* and even longer after it was first *presented* by the unions.

This contract covered for the first time in a general agreement the *same subject* matter as paragraphs second, third and fourth of the Rider with some wide variation.

This contract of August 16, 1941, *incorporated* by specific reference the Invitation Letter of Admiral Land and the opening remarks of Commissioner Macauley, quoted above, by *attaching copies thereof* to



the *contract* itself. This is an unusual illustration of the importance of the two documents which will be later further emphasized (167, 168, 213, 219, 221).

This contract of August 16, 1941, adopted six "War risk areas" in substantially the form proposed by the operators. It provides in part:

1. AREA IV (Trans-Pacific voyages) War bonus of "60% of basic wages from the crossing of the 180th Meridian westbound, until recrossing the same Meridian eastbound."
2. Lost effects, \$500.
3. Repatriation to a *continental* United States port.
4. If the vessel be lost or interned, *wages* and *emergency* increase to the date licensed officers arrive in a "*Continental* United States Port." *No war bonus* was *payable* in such event (224).
5. War risk insurance, \$5,000 (213-223).

Subsequent negotiations between the two Associations and other unions failed to result in an agreement covering any staff officers or unlicensed personnel on either Coast (43, 89, 169, 192). Frequent work stoppages continued to occur on vessels on both Atlantic and Pacific Coasts (43, 194).

On September 15, 1941, "Marine Firemen" made the following demands upon Pacific American Ship-owners Association:

1. In "Transpacific" trade *war bonus* of 75% of "basic" wages to all employees receiving basic wages in excess of \$120 per month; flat \$90 per month to all employees entitled to receive \$120 or less as basic wages per month. Bonus to be payable from "crossing of the 160th West Meridian westbound, until recrossing same Meri-

dian eastbound." Double bonus for vessels carrying dangerous cargo.

2. Lost effects, \$160.

3. Repatriation to *continental* United States ports.

4. In event vessel be lost or interned, wages *and* bonus to continue "*to the date members arrive in a Continenetal United States port.*"

5. War risk insurance, \$5,000 (193, 244-249).

On September 16, 1941, "Sailors' Union" likewise made written demands upon Pacific American Ship-owners Association calling for . . .

1. "War Bonus" of \$3 per day to each unlicensed member of the deck department in "transpacific" trade from the "day vessel crosses the 160th West Meridian, westbound, until the crossing of the same Meridian eastbound."

2. Loss of personal effects, \$250.

3. Repatriation to a *Pacific* Coast port.

4. If the vessel be lost or interned, wages *and* bonus for each member of the deck department "*until arrival at home port.*"

5. War risk insurance, \$10,000 (193, 250-255).

Other miscellaneous demands were likewise included by both unions. Other unions awaited developments and did not present demands at this time (193).

The situation became so acute due to frequent work stoppages on vessels on both Coasts, that on September 22, 1941, Admiral Land, Chairman of the United States Maritime Commission, telegraphed the two Associations of operators and the unions as follows:

"Maritime Commission views with concern

and anxiety the danger to shipping so vitally needed for national defense and all out aid to the democracies unless some method and procedure are immediately found and resorted to which will remove future sources of contention between all elements of the industry and which will stabilize and to a greater extent than now prevails *standardize* bonuses on our various trade routes. Believing that the solution of these problems rests primarily in the hands of representatives of operators and representatives of personnel and that these objectives can be secured through a joint meeting, the Maritime Commission will if requested by these representatives call such a meeting. We therefore offer the facilities of the Maritime Commission for purposes of holding conferences between the Seafarers' International Union, National Maritime Union, Sailors' Union of Pacific, Marine Cooks & Stewards of Pacific and Marine Firemen, Oilers, Water Tenders and Wipers Association of Pacific representing unlicensed personnel of vessels operated by companies who have collective bargaining agreements with those unions and the American Merchant Marine Institute, also the Pacific American Shipowners Association representing the owners, also other owners not members of those associations so that agreement can be reached between the owners and the unlicensed personnel with respect to *war bonuses* and *war risk areas*. Will be glad to make our facilities available for meeting in Washington Thursday this week. The Maritime Commission urges immediate return to work and sailing of vessels. Will appreciate your telegraphic reply. E. S. Land, U. S. Maritime Commission." (43, 44, 170, 171)

The "joint meeting" suggested by this wire, was not held, but the subject of war compensation of unlicensed personnel finally came before the National Defense Mediation Board in Case No. 80, on September 29, and October 1, 2, 3 and 4, 1941, in a proceeding in which American Merchant Marine Institute, Inc., and Pacific American Shipowners Association and the Sailors' Union of the Pacific were parties (45, 171, 172, 194). On October 6, 1941, the Board rendered its recommendations in which it created five "war risk areas" substantially similar to those of the agreement of August 16, 1941, between the Associations and the unions representing licensed personnel (171, 172, 195, 226). The recommendations of the Board provided, in part, the following:

1. War risk bonus of \$80 per month for "Trans-pacific voyages" after "*crossing the 180th Meridian westbound until recrossing the same Meridian eastbound.*"
2. \$100 per day, plus \$5 per day for each day beyond five days that the vessel is in a port subject to regular bombing (226-231).

These recommendations as to "voyages" followed closely the contract of August 16, 1941.

No special provision was made for loss of *personal effects, repatriation, compensation during internment, or war risk life insurance*. Provision, however, was made for modification in case of spread of hostilities. These recommendations were eventually incorporated by the parties in their contracts (120, 173).



## FURTHER DEVELOPMENTS IN LABOR NEGOTIATIONS ON WAR COMPENSATION ON PACIFIC COAST UNTIL "PEARL HARBOR"

Shortly following the publication of the Decision of the National Defense Mediation Board, in Case No. 80, and its acceptance, Fourth Supplementary Agreements covering the subject of war compensation were effected by Pacific American Shipowners Association with the six maritime unions on a substantially *uniform* basis. These six Supplementary Agreements were dated as follows (45, 46, 133, 195):

Masters, Mates	October 10, 1941 (259-265)
Marine Engineers	October 15, 1941 (265)
American Communications	October 16, 1941 (266)
Marine Firemen	October 9, 1941 (114-117)
Marine Cooks	October 10, 1941 (119-126)
Sailors' Union of the Pacific	October 9, 1941 (266-268)

These *October Supplementary Agreements* provided as follows:

1. "Five war zones," including "Transpacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula (after crossing the 180th Meridian westbound until recrossing the same Meridian eastbound)."
2. War Bonus of a *flat* \$80 a month to unlicensed personnel earning less than \$120 a month. (War bonus of 66 2/3% of basic wages was granted to unlicensed personnel receiving over \$120 a month *and* licensed officers by the October Supplementary Agreements. This increase over the rate in the contract of August 16, 1941, with licensed officers was necessary on both Coasts to equalize the licensed officers with the October

increase given the unlicensed personnel (177, 196).

3. Lost effects, licensed officers and radio operators, \$500; unlicensed personnel, \$150.
4. Repatriation to "Continental United States port."
5. If vessel be lost or interned *basic wages* and *emergency wages* until arrival at "Continental United States ports," and war *bonuses* at the rates specified \* \* \* shall be paid while "*employees are in the war zone areas described herein.*"
6. War risk insurance, all crew members, \$5,000 (114-117, 119-126).

The provisions of the October Supplementary Agreements with unlicensed personnel *including the four appellants all* contain the following two clauses:

"4. War Risk Insurance in the sum of \$5,000 shall be furnished to members of the crews of vessel on voyages provided for in this agreement.

"In the event a vessel is *interned, destroyed* or abandoned as a result of war operations and is unable to continue her voyage, the *basic wages* and *emergency wages* specified in the collective bargaining agreement between the parties shall be *paid to the date the members of the crew arrive in a Continental United States port* and the employees shall be repatriated to a Continental United States port. War *bonuses* at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid *while employees are in the war zones defined herein.*

"In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, min-

ing or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00." (123-124)

6. "The *provisions* of this agreement shall be *effective on all voyages* shipping articles for which were entered on or *after August 16, 1941*, or upon *any* voyage to which the *provisions* herein are made *applicable* by *special* agreement or *rider attached* to shipping articles." (124)

The October Supplementary Agreements covering licensed personnel and radio operators likewise contained language of similar character (259, 265, 266). The close relationship of the October Supplementary Agreements with the August Conferences and the objectives there sought of *uniformity* will be noted. The October Supplementary Agreements *all* became effective as of August 16, 1941, and in the case of the three unions representing *unlicensed* personnel each *likewise* refer specifically to the Decision of the National Defense Mediation Board in Case No. 80 (115, 120, 267). It is undisputed that the subject matter of the October Supplementary Agreements was unknown to the operator or crew of the "CAPILLO" when the Master signed on his crew October 11, 1941, and even when the vessel sailed (46, 112, 145, 149). On November 5, 1941, the operator purchased increased War Risk Insurance on all members of his crew from the \$2,000 of the May Supplementary Agreements and the Rider to the \$5,000 of the October Supplementary Agreements (157).

New agreements providing an *increase* in basic wages were finally negotiated and signed between



Pacific American Shipowners Association and the six unions as of the following dates:

Masters, Mates and Pilots,	December 12, 1941
Marine Engineers,	November 28, 1941- January 15, 1943
American Communications,	November 18, 1941
Marine Cooks,	October 31, 1941
Marine Firemen,	October 10, 1941
Sailors' Union	November 4, 1941
	(134)

By these agreements the basic wages of each of the appellants was increased \$10.00 a month. Considering the provisions of these agreements providing for increase in wages to have been incorporated by the Rider, appellants were each paid in New York at a wage rate of \$10.00 a month in excess of that shown on the Shipping Articles (135, 269).

#### **FURTHER DEVELOPMENTS IN LABOR NEGOTIATIONS ON WAR COMPENSATION ON ATLANTIC COAST UNTIL "PEARL HARBOR"**

Following the decision of the National Defense Mediation Board in Case No. 80 negotiations continued between the American Merchant Marine Institute, Inc., and the National Maritime Union of America, looking to an agreement covering war compensation for *unlicensed* personnel on the East Coast similar to the agreement reached on August 16, 1941, with licensed personnel (174, 175). As of November 6, 1941, such an agreement was made providing eight types of "*voyages*." As to the voyage here involved it provided:

1. "On the trans-Pacific, Far East and Australian



runs, \$80 per month from the 180th Meridian, westbound, until return to the 180th Meridian, eastbound."

2. Lost effects, \$150.

3. Repatriation to a "*Continental* United States port."

4. If the vessel be lost or interned, *basic wages* and *emergency wages* until arrived at a "Continental United States port." As in the case of licensed officers *no war bonus* was payable in such event (183, 186, 224).

5. War risk insurance, \$5,000 (231-236).

As of December 2, 1941, a similar contract was made between the parties covering certain *voyages* to Russia and the United Kingdom (176, 236-240). This contract likewise allowed basic wages and emergency increase after *loss* or internment of the vessel but *no bonus* was payable in such event. Also the agreement of August 16, 1941, between operators and unions on the Atlantic Coast was amended to raise bonus from 60% to 66 2/3% of basic wages to equalize the increased bonus to unlicensed personnel (177, 178). Thus on December 7, 1941, the *uniformity* so strongly urged by Admiral Land and Commissioner Macauley in the meetings held in August, 1941, was substantially attained on both Coasts by signed collective bargaining agreements.

## FURTHER NATIONAL DEVELOPMENTS ON WAR COMPENSATION FOLLOWING "PEARL HARBOR"

In accordance with the promise made by Commissioner Macauley in his remarks on August 12, 1941, heretofore quoted (222), a meeting of all operators and unions on both Coasts was called in Washington, D. C., by the United States Maritime Commission and the United States Department of Labor on December 17-19, 1941, within ten days of the attack on Pearl Harbor (47, 92, 199). At this meeting a "Statement of Principles" was adopted and signed on behalf of the operators, including American Line Ltd. and the unions, including all here involved (47, 92, 199-205). The opening paragraph is as follows:

"I. In so far as areas, war bonuses and insurance are concerned, it is regarded as desirable and necessary that a *uniform basis* for each item covering the entire Nation and the entire Industry be reached."

By a *joint voluntary action* of the parties the "Maritime War Emergency Board" was created to settle "questions relating to *war risk compensation* and insurance," it being impossible for the parties to negotiate intelligently on the subject because of war secrecy as to comparative risk in war zones. A three-man board was proposed whose decision on any "*question* relating to *war risk compensation* or war risk insurance" was "*final and binding upon all parties*" (203).

On December 19, 1941, the President of the United States, upon the joint request of the parties, appointed a board of three to carry out the purposes of

the "Statement of Principles" (205-6). The Board has "exclusively handled" all *bonus* questions since its appointment (92, 93). At this time the "CAPILLO" was still on her "voyage" awaiting orders of the Government authorities in Manila (36, 81).

## DECISIONS OF THE MARITIME WAR EMERGENCY BOARD

The Board on December 22, 1941, by Decision No. 1, made *retroactive* to December 7, 1941, promptly established war risk insurance of \$5,000. Other Decisions quickly followed. See 1942 A.M.C. 308.

By Decision No. 2, dated January 10, 1942, likewise made *retroactive* to December 7, 1941, the Board divided "voyages" into six classifications in the same manner as had the Supplementary Agreements which it superseded (272-274). In fact the Decision said:

"In making this Decision the Board has given due consideration to the existing conditions at sea and in port, based upon the latest and best information available, *and to existing collective bargaining agreements.*" (270)

Decision No. 2 of the Board increased war bonus in Classification No. I(b) "Trans-Pacific voyages" to 100% of wages and emergency increase with a floor of not less than \$100.00 per month in any case (47, 48, 272, 274). It provided a *port bonus* of \$125.00 for calls in the Philippine Islands (275).

Decision No. 5 of the Board was first made January 23, 1942. It covered for the first time "payments to seamen \* \* \* while interned as a result of enemy action and until repatriation to Continental United

States." It was made retroactive "to and including December 7, 1941." It only provided for payment of "basic wages and emergency wages" after loss or destruction of the vessel. It had no provision for continuation of bonus after loss or internment of the vessel. This decision said:

"In making this Decision the Board has given careful consideration \* \* \* to existing collective bargaining agreements." (288)

A Supplement to Decision No. 5, dated February 6, 1942, is of no importance here (293). A third amendment to Decision No. 5, dated February 17, 1942, for the first time specifically covered the subject of continuation of bonus following the loss or internment of the vessel. It said:

"2. The Board has given consideration to the continuance of bonus in the case of the destruction of the vessel, which subject was not covered by Decision No. 5, and, as a result, Decision No. 5 has been amended by inserting a new Article at the end thereof, designated Article 6 and reading as follows" (295):

By Article 6 the rule is stated that when a United States vessel is lost or interned war bonus continues "until the seaman arrives at a port where he is no longer exposed to marine perils \* \* \*" (295-296). If he is repatriated by sea then he shall receive *during the repatriation voyage war bonus at the same rate* that he would have received if his own vessel were making the same *voyage* as the vessel on which he is being repatriated. In other words war bonus was not ended at once upon loss or internment of vessel, but continued to be payable when a seaman is exposed to a marine *and* war risk (See definition of bonus, 113).



The three amendments were combined without further change in Decision No. 5, Revised, issued February 21, 1942 (280-287). Decision No. 5, Revised, with the last amendment referred to above, provides:

“The Board has given *additional* consideration to the current war conditions at sea and to *existing collective bargaining agreements* prior to writing these revisions.” (280-281)

Decision 5 Revised provides:

“This Decision is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the making of payments provided for herein contained in ships Articles entered into on or before \* \* \* February 21, 1942, with respect to payments provided for in Article 6 hereof or collective bargaining agreements in effect at the time when ship's articles were entered into as aforesaid, *or where the making of such payments were expressly left open subject to later agreement either in the ship's articles or such collective bargaining agreements.*” (281-282)

The rule of the Maritime War Emergency Board that no bonus is payable during *interment ashore* has been the uninterrupted rule of the Board since its first pronouncement on the subject.<sup>3</sup> Its last pronounce-

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<sup>3</sup>Maritime War Emergency Board Weekly Bulletin No. 12. March 6, 1943. Ruling No. 8.

Weekly Bulletin No. 17, April 10, 1943. Ruling No. 4.

See also Original Respondent's Exhibit A-13, Article January, 1944, Monthly Labor Review, U. S. Dept. of Labor, *not admitted* by trial court. Note, however, a correction of this article in one respect (182, 183).

ment on the subject was in Decision 2-D, dated August 31, 1945:

“Article IV, A(1)

“1. Bonus shall *not* be payable while a crew member is *on land* after separation from his vessel.

“2. Bonus shall *not be payable during* the period that a crew member is *detained* either by capture by the enemy of an United States or *by internment.*”

1945 A.M.C. 1176, 1182.

The trial court adopted the view that Decision 2 and Decision 5 Revised of the Maritime War Emergency Board were incorporated by the first and last paragraphs of the Rider and so became controlling, and gave judgment accordingly (47-49).

### ARGUMENT

#### Admissibility of surrounding circumstances in construction of ambiguous contract.

It is well settled that the situation of the parties and the surrounding circumstances may be taken into consideration in construing an ambiguous contract. This would seem especially true where, as here, the contract itself incorporates by reference the terms of outside agreements then under negotiation.

In *New York Alaska Company v. Walbridge* (C.C. A. 9) 76 F.(2d) 655, the court said:

“It is also well settled that when the meaning of a contract is not clear, the situation of the parties and the surrounding circumstances at the time of the making of the contract are to be taken into consideration.”

*Franklin Fire Co. v. Hanney* (C.C.A. 9)  
149 F.(2d) 150;

*Mobile & Montgomery Co. v. Jurey*, 111  
U.S. 584, at 592.

This is also the law of Oregon and Washington.

*Teiser v. Swirsky*, 137 Ore. 595, 2 P.(2d)  
920.

In *Vance v. Ingram*, 16 Wn.(2d) 399, 133 P.(2d)  
938, the court said:

“One further rule of construction should be mentioned. The court may always consider the surrounding circumstances leading up to the execution of an agreement, not to evidence an intent contrary to that expressed in the agreement, but to place the court in the same position as the parties. \* \* \*”

12 Am. Jur. 784;

Restatement of Law of Contracts, §230,  
§235(d), §242.

### **Which supplementary agreements are incorporated by the rider?**

For ready reference we quote again the first and last paragraphs of the Rider at this point:

“The American Mail Line agrees to pay an emergency war bonus to the crew of the S. S. CAPILLO, voyage 6, in accordance with *provisions* contained in the *applicable* supplementary agreements in effect between the Pacific American Shipowners' Association and the various marine unions.

\* \* \* \* \*

“It is further agreed that in the event of any *increase* in pay, overtime or war bonus, which

may be granted, as the result of negotiations between the Union and the Pacific American Ship-owners' Association, the company will be governed by the *terms* and *effective* date of any agreement so reached." (31, 32, 36, 37)

This language is susceptible of three possible interpretations:

**Are supplementary agreements of May 19, 1941, incorporated?**

It could possibly be argued that the "applicable" Supplementary Agreements made effective by the first paragraph of the Rider are the agreements of May 19, 1941. In support of this theory the following might be urged:

1. It was clearly the one actually in the mind of the parties when the Rider was *first* used. No other existed on August 13, 1941. That this was likewise so even on October 11, 1941, is indicated by the reference in the Rider to the war risk insurance of \$2,000.00 created by the Agreements of May 19, 1941, and the ignorance of the parties of the *terms* of any other supplementary agreements (46, 112, 145, 149).

2. It explains the inclusion of the second and third paragraphs of the Rider having to do with compensation after loss or internment of the vessel and for lost effects. These were inserted because no provision was made for such matters in the agreements of May 19, 1941, and no agreement on same had been reached on August 13, 1941, when the Rider was *first* used. As heretofore indicated, *without such provisions*, upon loss or internment of the vessel further obligation to the crew *terminated*. Its use was continued because



no agreement was known to exist on such matters on October 11, 1941, when it was placed on the Shipping Articles of the "CAPILLO" (46, 98, 112, 145, 149, 154).

Such an interpretation, however, *completely ignores*:

(a) The obvious attempt of the *first* paragraph of the Rider to incorporate the "provisions" of Supplementary Agreements as they became "applicable," thus keeping the Rider at all times *current* with the rapidly changing conditions.

(b) The *last* paragraph of the Rider which incorporates the "*terms and effective date*" of any later agreements which increased "pay, overtime or war bonus."

It might be emphasized here that there were several increases in "pay, overtime or war bonus" in the October Supplementary Agreements over the Supplementary Agreements of May 19, 1941, thus likewise bringing into play the last paragraph of the Rider.

1. The rate of bonus was increased from \$60.00 a month to \$80.00 a month, for unlicensed personnel, such as appellants, earning under \$120.00 a month (133, 116).

2. For licensed officers and unlicensed personnel earning over \$120.00 a month bonus was raised from 50% of basic wages to 66 2/3% of basic wages (132, 116, 261, 265).

3. The area in which bonus was payable in all cases was increased *from* the crossing of the 160th Meridian westbound to recrossing the same Meridian eastbound

to the period from crossing the 180th Meridian westbound to recrossing the 180th Meridian eastbound (132, 116, 261).

4. Port bonus was provided in the case of unlicensed personnel for ports subject to regular bombing (114, 117, 266).

5. Payment for lost effects of unlicensed personnel was provided at \$150.00 and for licensed personnel at \$500.00 for the first time in the October Supplementary Agreements (114, 117, 259, 265, 266).

6. War risk insurance increased for all persons from \$2,000.00 to \$5,000.00 (114, 117, 259, 265, 266).

It will be also recalled that basic wages for the appellants had been raised \$10.00 a month by contracts negotiated in the late fall of 1941, and appellants were paid off at these new basic rates rather than those shown in the Articles (135, 269).

(c) The following language of the October Supplementary Agreements covering the four appellants:

"6. The *provisions* of this agreement *shall* be effective on *all voyages* shipping articles for which were entered on or *after August 16, 1941*, or upon *any* voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles." (124)

By this clause of the October Supplementary Agreements it is mandatory that their "provisions" are effective "on all voyages" shipping articles for which were entered into on and after "August 16, 1941," which, of course, includes the voyage here in question which commenced some two months after August 16, 1941.

It is an interesting sidelight on the use of the Rider that when it was first used on August 13, 1941, the alternate paragraph of the quotation above would have been applicable and it would be incumbent upon the court to decide whether or not the October Supplementary Agreements had been incorporated by "special agreement or rider attached to shipping articles." On the subsequent three occasions when the Rider was used, however, no such determination would have been necessary as it was *mandatory* that the provisions of the October Supplementary Agreements be applied.

So again, this is likewise the uncontradicted testimony of the witnesses in the case.

MR. LINTNER: "My understanding was at the time that a rider was just a temporary understanding which was to be interpreted and determined by the results of negotiations which were under way at the time. It was not unusual for us to put on riders on articles to cover situations that were under discussion, and in every case it was the practical application that the results and the agreements reached in connection with those riders were what the rider meant." (98, 99)

MR. WILLIAMS: "Well, it is my opinion that, in the first place, the rider to the articles was introduced by the Union officials, and not necessarily by the men themselves, so the men recognized that the Unions were acting on behalf of them when the rider was first presented. So, with the reading of the first paragraph and the last paragraph, in which *they agree to be bound by any supplemental agreements negotiated between the Ship Owners and the Unions*, that that in itself proved that the men were giving the Union authority to act on their behalf." (154)

It is therefore clear that (aside from the question of the applicability of the Decisions of the Maritime War Emergency Board) the "provisions" of the October Supplementary Agreements were incorporated in the contract of employment of appellants and supplanted the rider provisions to the contrary. This was accomplished: (a) by the first and last paragraphs of the Rider; (b) by the language of the October Supplementary Agreements themselves, and (c) by the uncontradicted testimony of the witnesses.

The amended libel, the opening statement of appellants at the trial and the appellants' brief specifically rely upon the October Supplementary Agreements (17, 81; Appellants' Brief, pp. 29, 37, 59).

**Are supplementary agreements of October, 1941, incorporated by the rider?**

Disregarding for the moment the decisions of the Maritime War Emergency Board, it thus appears that all parties are in agreement that the October Supplementary Agreements apply. The particular applicable "provisions" and "terms" of the October Supplementary Agreement between the Marine Cooks and Pacific American Shipowners Association dated August 9, 1941, reads as follows:

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the *basic* wages and *emergency* wages specified in the collective bargaining agreement between the parties shall be paid to the *date* the members of the crew arrive in a *Continental* United States port and the employees shall be repatriated to a *Continental* United States port. War *bonuses* at the rates



specified in subdivision (b) of paragraph 1 hereof shall be *paid while employees are in the war zones defined herein.*" (123-124)

The agreement with the "Marine Firemen" is identical (73, 74, 114-117). By this "provision" of the Supplementary Agreement the obligation of appellee in the Rider to "repatriate to a United States Port on the *Pacific Coast*" has been supplanted by the obligation merely to repatriate "to a *Continental* United States Port." This was admittedly done when the four appellants were landed from the M/V "GRIPSHOLM" at New York on December 2, 1943.

The quoted paragraph from the October Supplementary Agreement likewise substituted for the obligation of appellee in the Rider to pay "*bonus* to the date members of the crew arrive at a United States Port, on the *Pacific Coast*," the obligation merely to pay war bonus in case of loss or internment of the vessel "*while employees are in the war zones defined herein.*"

**History of clause in October supplementary agreements providing that in case of loss or internment of vessel war bonus was to be paid "*while employees are in the war zones defined herein.*"**

The following will be observed from the foregoing detailed discussion of the negotiations between the operators and the unions:

1. There was no Supplementary Agreement on the subject of *any* compensation after loss or internment of the vessel before August 16, 1941. Without some

special agreement *all* compensation ended in such case.

2. In negotiations with licensed officers leading up to the contract of that date they sought in case of loss or internment of vessel "wages and emergency wages *and* war bonus until and including the day of their arrival in a port of the United States," thus linking *wages* and *bonus*.

3. Operators made a counter-proposal agreeing to this demand for wages and emergency wages but offering to pay bonus in such event *only* "*while the men are in the danger zones defined herein*," thus clearly disassociating *wages* and *bonus* and limiting the latter to the *period* when employees were in a "defined" zone.

4. In the actual agreement of August 16, 1941, between the operators and *licensed* officers *bonus ceased* upon the loss or internment of the vessel although wages and emergency increase continued until the officers were repatriated to a continental United States port. This situation continued on the Atlantic Coast in the case of licensed personnel until "Pearl Harbor."

5. On the *Atlantic Coast* supplementary agreements between American Merchant Marine, Inc., and *unlicensed* personnel *likewise ended war bonus* upon the loss or internment of the vessel, although wages and emergency increase continued until repatriated to a continental United States port.

6. On the Pacific Coast, however, after the August agreement with licensed officers, the unlicensed personnel in their negotiations with Pacific American Shipowners Association continued to demand wages

and bonus in case of loss or internment of the vessel until seamen were returned to a continental United States port or to the home port, thus again linking wages *and* bonus.

7. In *all* six October Supplementary Agreements on the Pacific Coast the parties finally adopted the *counter-proposal* made by the two Associations to licensed officers on the subject of compensation after loss or destruction of the vessel in the negotiations leading up to the contract of August 16, 1941. These October Supplementary Agreements provided that in the event a vessel was lost or interned "basic" and "emergency wages" would be paid until arrival of the crew member in a continental United States port, *but bonus* was only payable "while employees are in the *war zones* defined herein."

**What is a "war zone" as "defined" in the October supplementary agreements?**

The October Supplementary Agreement covering "Marine Cooks" provides in part as follows:

"1. The following war bonus rules shall govern the parties hereto—

"(a) There shall be five *war zones*; namely:

"I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States ports via India and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th Meridian, eastbound, and thereafter no further bonuses will be payable.)

"II. Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage).

"III. Trans-Pacific Voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until recrossing the same Meridian eastbound.)

"IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound.)

"V. Canada (Atlantic Coast) (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port.)" (120,121) (See entire Supplementary Agreement in appendix to this brief.)

The other October Supplementary Agreements are substantially the same (114, 119, 259, 265, 266). They all followed the form of the contract of August 16, 1941, and the decision of the National Defense Mediation Board in Case No. 80 to which they are so closely tied.

From the time of the First Supplementary Agreement made by Pacific American Shipowners Association with the Unions on the subject of war compensation, bonus has been universally linked with "voyages," "vessels" and "waters." The contract of August 16, 1941, the decision of the National Defense Mediation Board in Case No. 80 and the October Supplementary Agreements continued linking this definition of a *war zone* with "voyages"; some mention specifically a "vessel" (121, 131, 261, 262). The uncon-



tradicted testimony in the instant case is to the same effect.

“Q. Now, will you state what was meant by the term ‘bonus’? A. Bonus was an agreed sum of money to be paid for the additional dangers of going into dangerous *waters and war zones*.” (113)

A “voyage” is thus defined in the dictionary:

“Formerly, a passage either by sea or land; a journey, in general; *now, only*, a passing or journey by sea or water from one place, port, or country, to another; esp., a passage or journey by *water* to a distant place or country.”

Webster’s New International Dictionary.

“Voyage. 1. A journey by *water*, especially by sea; commonly used of a somewhat extended journey by water; formerly, any journey, as, a voyage across the sea. 2. Specif., the outward and homeward passages of a vessel taken together; the whole course of a vessel before reaching her home port.”

Funk & Wagnalls New Standard Dictionary.

The slight ambiguity in the meaning of the language in the October Supplementary Agreements on *bonus* may be accounted for by the fact that under the October Supplementary Agreements the “*war zone*” in *question* is “defined” as follows:

“III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound until recrossing the same Meridian eastbound)” (121)

Standing alone, this might be thought to create a “war risk zone” of all *land and sea* west of the 180th

Meridian and thus entitle the crew member of a vessel lost or interned west of the 180th Meridian to *bonus* whether he was on *land* or *sea* until he recrossed the 180th Meridian eastbound. This is the view of appellants (Appellants' Brief, p. 42). Taken literally, the theory mentioned above might allow appellants to continue to collect bonus as they have never *recrossed* the 180th Meridian eastbound, the M/V "GRIPSHOLM" having continued around the world and having discharged appellants in New York. This is *not* the meaning of the Supplementary Agreement. Bonus is payable only while employees are in the "war zones *defined* herein." Wages and emergency increase, on the other hand, are linked to a period of *time*, and continue after loss or internment of the vessel to the "date the members of the crew arrive *tive* of the *location* of the individual."

In the First Supplementary Agreements of 1940, in the Second Supplementary Agreements of February 10, 1941, and in the Third Supplementary Agreements of May 19, 1941, bonus was payable in terms of "*voyages*" first from arrival of vessel at first Japanese port westbound until its departure from last Japanese port eastbound, then from crossing of 160th Meridian westbound until recrossing the 160th Meridian eastbound. At that time, it will be recalled, there was *no* provision whatsoever in supplemental agreements for payment of any compensation *after* loss or internment of the vessel and the consequent end of the "voyage." As explained above, prior to the agreement of August 16, 1941, there being no specific contractual obligation to pay any compensation after

loss or internment of the vessel it would *automatically cease* upon such event. *The Supplementary Agreements of 1940, February 10, 1941, and May 19, 1941, that bonus was payable from arrival of vessel at first Japanese port westbound until departure from last Japanese port eastbound, and from crossing of 160th Meridian westbound until recrossing the 160th Meridian eastbound, at that time could only refer to its continuance during a combined marine and war risk, as it necessarily ended when the vessel was lost or interned.*

In so far as wages and emergency increase were concerned the October Supplementary Agreements specifically provided that they should be paid "to the date the members of the crew arrive in a Continental United States port." But as to bonus it was to be paid "while employees are in the war zones *defined* herein," which definition is in virtually the same language as it had been for a year and a half before any provision was made for its continuance after loss or internment of the vessel, and when it could *only mean* that it was payable only while a combined war *and* marine risk existed. In other words, loss or internment of the vessel did not terminate bonus at once, if the seamen were still on a "voyage" exposed to marine risk.

A "war zone" as defined in the Supplementary Agreements has always contemplated from the beginning a combined marine *and* war risk.

The same language has continued to have the same meaning.

Words used in one sense in one part of a contract

are as a general rule deemed to have been used in the same sense in another part of the instrument where there is nothing in the context to indicate otherwise.

In *Pringle v. Wilson*, 156 Calif. 313, 104 P.(2d) 316, 24 L.R.A., N.S., 1090, the court said:

“It is a familiar rule of construction that, other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another.”

In *Jensen v. Franklin* (10 C.C.A. 1934) 74 F.(2d) 501, the court said:

“Words used in a certain sense in one part of a contract will be deemed to have been used in the same sense in another part, unless the context indicates otherwise.”

In *Midland Valley R. Co. v. Railway Express Agency* (10 C.C.A. 1939) 105 F.(2d) 201, the court said:

“It is an inveterate rule in the construction of a written instrument that ordinarily the same word occurring more than once is to be given the same meaning unless the context indicates that it was used in a different sense.”

12 Am. Jur. 761.

The situation is clarified if we take another “war zone” to use as an illustration. “War Zone \* \* \* II” is described as follows:

“Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)” (121).

This obviously means that a crew member is entitled to bonus on the entire *voyage* from the United States to Russia and return irrespective of crossing any particular meridian. It could certainly not be successful-



ly urged that in the event of loss or internment of a vessel making such a voyage that a crew member who had been interned in Europe, say in Germany, would be entitled to bonus during the period of his *internment ashore*. A crew member might on such a voyage very well have been captured by a German vessel and interned in Germany and later repatriated to the United States. In such case by the October Supplementary Agreements wages and emergency wages would certainly be payable until his repatriation to a "Continental United States port." However, he could certainly not successfully claim that during his internment he was in a "war zone defined herein" when the definition was "Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)." He would probably be entitled under such circumstances to bonus until he reached shore after loss of his vessel and the obligation might be resumed through his repatriation voyage, if he were repatriated by sea. But internment ashore, in, possibly, Southern Germany, would certainly *not constitute* being "*in the war zones defined herein,*" to-wit: "Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)," so as to entitle him to bonus for the period.

The counter-proposal of the two Associations at the Washington Conference on August 12, 1941, thus adopted on the Pacific Coast in the October Supplementary Agreements, was a compromise by which the bonus would *not stop* at once upon the loss or internment of the vessel but would continue so long as there was a marine *and* war risk encountered before the crew reached land or during a repatriation voy-

age. In August, 1941, it was a counter-proposal to the unions' demand that war bonus should continue *like wages* after the loss or internment of a vessel *until the crew be repatriated to the United States*. The counter-proposal of the Associations first incorporated in the Pacific Coast October Supplementary Agreements finally became the *national* rule under the Maritime War Emergency Board.

When the Maritime War Emergency Board was created after "Pearl Harbor" it gave "*additional consideration \* \* \* to existing collective bargaining agreements*" (280) before adopting a rule on bonus after loss or internment of the vessel, and adopted, *not* the strict rule of the Atlantic Coast that following loss or internment of the vessel *bonus ceased entirely*, but it adopted the more *liberal* policy of the Pacific Coast agreement once *offered* by the two Associations that war bonus, being always a compensation for marine *and* war risk, should continue even after loss or capture of the vessel, while crews were exposed to both risks, which meant until they reached shore after a loss or while they were being repatriated by sea.

If the October Supplementary Agreements are controlling the decision of the lower court must be slightly modified in the following respects:

1. Increased war bonus from December 7, 1941, to December 29, 1941, to each appellant in the sum of \$14.69 must be *disallowed*.
2. War bonus during the repatriation voyage of the M/V "GRIPSHOLM" must be reduced 20% from \$100.00 to \$80.00 per month.

Otherwise, the decision of the lower court must be

affirmed. The difference in the final result is not substantial.

**Are decisions of Maritime War Emergency Board incorporated?**

The adoption of the October Supplementary Agreement possibly does not, however, give *full effect* to the last paragraph of the Rider as there were subsequent developments following the commencement of the war which *increased* bonus which such a construction would ignore.

The Decisions of the Maritime War Emergency Board were adopted by the trial court as having been incorporated by the terms of the Rider. Such a construction follows the trend of negotiations toward *National Uniformity* in the summer and fall of 1941. In the August meeting of the Industry, Chairman Macauley of the U. S. Maritime Commission, emphasized that contracts should only be made to last until a war started. He promised that in such event another meeting would be called to review the subject in the light of commencement of the war (222). His remarks were made a part of the contract of August 16, 1941, and are an integral part of the background leading to the solution of this case.

In accordance with the promise of Commissioner Macauley a meeting was called jointly by the U. S. Maritime Commission and the Department of Labor in Washington, D. C., ten days after the war started; all interested operators and unions attended, and the voluntary board created by the parties at such time has functioned uninterruptedly in connection with *all*



*bonus* questions since the war began (92, 93, 200-6). This Board substantially *increased* bonus rates and extended bonus areas by its Decision No. 2 following the pattern of "voyages."<sup>4</sup> (47, 48, 272, 274) As indicated above, it also adopted what it believed to be the most liberal general policy of the industry on bonus payments after loss or internment of the vessel, as reflected by "*existing collective bargaining*" agreements on the Pacific Coast. The Decisions of this Board thus increasing "bonus" would seem to be agreements the "terms and effective date" of which are incorporated by the last clause of the Rider. They would further seem to be "the result of negotiations" within the broad sense of the words as the last paragraph of the Rider provides (31, 36).

The Maritime War Emergency Board in a Decision made June 21, 1944, upheld its authority under the "Statement of Principles" to *reduce*, as well as *raise*, war bonuses. In the course of the opinion, the court said (1944 A.M.C. 1022):

"It has always been the theory and practice of the Board that the Statement of Principles was *not* a *departure* from collective bargaining practices, but was a plain mandate from the signatories to the Board to set up a procedure to cover war risk compensation and insurance on a *uniform* basis covering the entire nation and the entire industry for the duration of the war. To return now to individual bargaining between individual operators and unions in this field or to

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<sup>4</sup>For general discussion of early activities of Maritime War Emergency Board, see 1942 A.M.C. 308, discussing the first five Decisions of the Board.



take the position that the Board can act on individual cases and take action on a *national uniform basis* only by way of recommendation, is to deny the controlling intent of the Statement of Principles and to reproduce the chaos and confusion which brought the signatories together in December of 1941."

So again, the making of payments in the event the vessel was lost or interned might well be said, in view of the last paragraph of the Rider, to have been "expressly left open subject to later agreements either in ship's articles or such collective bargaining agreements" within the meaning of the language of Decision No. 5, Revised, making it retroactive in that event to December 7, 1941 (281-282). The last paragraph of the Rider expressly made the "terms" of subsequent negotiations, which *raised bonus*, governing.

The language of the Statement of Principles (Respondent's Exhibit K) (199) reading as follows should not be misinterpreted:

"It is understood and agreed that all rights guaranteed to labor and industry with respect to collective bargaining will be retained and all agreements and obligations arising as a result of collective bargaining agreements will in no way be violated." (See appellant's brief, page 53)

This language has to do with the general subject of collective bargaining on wages and working conditions. It is undisputed that the Maritime War Emergency Board since its creation has "exclusively handled" all bonus questions (92, 93). The Decisions of the Maritime War Emergency Board on bonus from

the beginning cut directly across existing agreements by making the Decisions retroactive.

Appellants at first appeared to think the Decisions of the Board applied. In their original libel, filed in the instant case, they claimed war bonus at the rate of \$100.00 per month under Decision No. 2 of the Maritime War Emergency Board. (4) When exceptions were sustained by the lower court to this reference to the Decisions of the Maritime War Emergency Board, appellants amended their libel and sought recovery of war bonus at the rate provided in the October, 1941, agreements (9, 15, 16). Appellants assert no error in the action of the trial court on these exceptions and do not urge the "Decisions" as incorporated by the Rider (Appellants' Brief, p. 39).

Maritime War Emergency Board Decision No. 2, made expressly retroactive to December 7, 1941, following the pattern of the industry, covered the subject of bonus in terms of "voyages." The Maritime War Emergency Board itself was set up while the "voyage" of the "CAPILLO" was still in progress, the vessel with its entire crew being at Manila, P. I., not having been destroyed until December 29, 1941, ten days after the appointment of the Board. It can be argued that Decision No. 2 of the Board dated January 10, 1942 (270) increasing war bonus had no application to this case as the "voyage" of the vessel had ended and the decision contemplated voyages then in progress. On the other hand, it may be likewise argued that Decision No. 2 and Decision No. 5, Revised, of the Board (270, 280) contemplated voyages which were in existence on December 7, 1941, which

would clearly embrace the case of the "CAPILLO." An "area" bonus of \$5 per day in addition to "voyage" bonus was first created by Decision 2A of the Board adopted Feb. 27, 1943. But even this "area" bonus was and is not payable unless a crew member is exposed to both a war and marine risk. See 1944 A.M.C. 1020, 1023. 1945 A.M.C. 1176, 1182.

As heretofore indicated the difference in the ultimate result is relatively immaterial as the appellants receive slightly less under the October Supplementary Agreements. We have tried to place all the pertinent facts before the court.

### **COMMENTS ON BRIEF OF APPELLANTS**

#### **No dispute in facts.**

All parties are agreed that there are no disputed questions of fact, as appellants say on pages 2 and 29 of their brief.

**Provisions of October supplementary agreements covering "marine cooks," "marine firemen" and "sailors" are identical save for the general introductory paragraphs.**

On page 6 of appellants' brief, and repeated on pages 6, 7, 31, and 42, are statements that Exhibit A-3, the October Supplementary Agreement covering "marine firemen," differed from Exhibit A-4 covering "marine cooks" in that the former did not contain the following paragraphs included in the latter:

"In the event a vessel is interned, destroyed, or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective



bargaining agreement between the parties shall be paid to the date members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

\* \* \* \* \*

"The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941, or upon *any voyage* to which the provisions herein are made applicable by special agreement or rider attached to shipping articles." (119, 114, 266)

All three October Supplementary Agreements covering unlicensed personnel contained these clauses.

Proctor for appellants upon having the matter called to his attention promptly notified the Clerk of this Court of this inadvertent error.

As stated in the earlier portion of this brief similar language is contained in the October Supplementary Agreements covering staff officers and licensed officers (259, 265, 266).

**Exhibit A-12 emphasizes consideration given by Maritime War Emergency Board to *existing* collective bargaining agreements.**

The remark on page 13 of appellants' brief that American Mail Line Ltd. "as one of the signatories to the Statement of Principles, did not follow this admonition of the Maritime War Emergency Board" to "destroy" the Decisions which were later com-



bined to make Decision No. 5, Revised (280), is not quite understood. It appears to be a criticism but the reason for same is not clear. The Decisions contained in Respondent's Exhibit A-12 (287) are certified to by the Secretary of the Maritime War Emergency Board as being "true, full and correct copies of the originals of the same held in my custody." They were introduced as showing the various steps which led to the ultimate adoption of the rules of the Board on compensation after the loss or internment of the vessel. The first Decision No. 5 of January 23, 1942, stated that in making this Decision the Board had "given careful *consideration* to \* \* \* existing collective bargaining agreements" (288).

When Decision No. 5, Revised, dated February 21, 1942, was promulgated combining the original Decision and amendments, it contained the new rule first adopted on February 17, 1942, on payment of war *bonus after* loss or internment of the vessel (294). Decision No. 5, Revised, dated February 21, 1942, stated "The Board has given *additional* consideration to \* \* \* existing collective bargaining agreements prior to writing these revisions" (280).

Exhibit A-12 was introduced merely to emphasize the continuing efforts of the Board to carry forward what it believed to be the general rules on the subject matter created by "existing" collective bargaining agreements. The October Supplementary Agreements were the most favorable "existing" contracts for the seamen on this subject and the Board adopted their rule on payment of bonus after loss or internment of the vessel while seamen were in the "war zones de-

fined herein," *i.e.*, while they were on a "voyage" in dangerous waters.

**Date of decision in Case No. 80 of National Defense Mediation Board.**

On page 18 of appellants' brief it is stated that the date when this decision was handed down "does not appear in the record." President J. B. Bryan of the Pacific American Shipowners Association testified concerning this subject: "This decision which is undated was rendered and distributed about October 6, 1941" (195).

The decision of the National Defense Mediation Board in Case No. 80 is significant in two respects: (1) It was the basis on which collective bargaining agreements were signed with unlicensed personnel on the Atlantic Coast (173) and on the Pacific Coast (195); (2) Following this decision minor adjustments had to be made on both Coasts to maintain the differential between licensed and unlicensed personnel (177, 196).

The decision is specifically mentioned in the introductory paragraphs of all October Supplementary Agreements covering unlicensed personnel (114, 119, 266). While the Board only made "Recommendations" these recommendations adopted the practice of the industry to describe bonus areas in terms of "voyages." Case No. 80 is of importance as a part of the whole history leading up to the subject matter of this litigation, particularly as these recommendations were accepted on both Coasts.

**The agreement of August 16, 1941, was changed by Exhibits A-5 and A-6.**

On page 20 of appellants' brief the statement is made that Exhibit B, the agreement of August 16, 1941, with licensed officers, was superseded by Exhibits A-5 and A-6 "although Mullins testified there was no other agreement (Aps. 178), only some recommendations by the commission." Mr. Mullins testified (177) that on the Atlantic Coast the rates for licensed officers provided by the contract of August 16, 1941, were raised because of the inequity created by the increase in the bonus to unlicensed personnel by Decision No. 80 of the National Defense Mediation Board. He testified that except for this increase the contract of August 16, 1941, remained unchanged until the War Emergency Board. He was, of course, speaking of the contract in so far as *his* Association was concerned (178). Mr. Bryan testified, concerning Pacific American Shipowners Association, that a corresponding increase in the rates of the contract of August 16, 1941, were made for the Pacific Coast and were incorporated in the October Supplementary Agreements, Exhibits A-5 and A-6 (259, 265) which on the Pacific Coast, of course, supplanted the agreement of August 16, 1941.

**Rider will be interpreted to carry out the *general intent* to make supplementary agreements controlling.**

The quotation on page 33 of appellants' brief to this effect is certainly good law.

The general purpose of uniformity is evident throughout the history of negotiations between the

parties in the latter half of the year 1941. The language of the first and last paragraphs of the Rider carry forward this trend. A construction which will support this "general" purpose is always favored.

Williston on Contracts, Revised Edition, §619:

"The court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable; and if that is impossible an interpretation which gives effect to the *main apparent* purpose of the contract will be favored. Indeed in giving effect to the general meaning of a writing particular words are sometimes wholly disregarded, or supplied, or transported."

"§624. It was early laid down, that, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected. The same doctrine has been held in some modern cases applicable to contracts generally. \* \* \* The *true rule* seems to be as stated in a Maine decision. \* \* \*

" 'When one intention appears in one clause in an instrument, and a different, conflicting intention appears in another clause in the same instrument, that intention should be given effect which appears in the *principal* or more *important* clause'."

*Union Water Co. v. Lewiston*, 101 Me. 564,  
65 A. 67.

12 Am. Jur. 779:

"Where a repugnancy is found between clauses, the one which essentially requires something to



be done to effect the *general* purpose of the contract is entitled to greater consideration than the other. The whole agreement should, if possible, be construed so as to conform to an evident consistent purpose. Accordingly, a subsequent clause irreconcilable with a former clause and repugnant to the *general* purpose and intent may be disregarded."

*Marx v. American Malting Co.* (6 C.C.A.) 169 Fed. 582, 584:

"\* \* \* Then, again, it is a fundamental rule in the interpretation of agreements that we should ascertain the prime *object* and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed as not to conflict with the *main* purpose. \* \* \*"

*Linde Dredging Co. v. Southwest Co.* (5 C.C.A.) 67 F.(2d) 969, at p. 972.

An excellent example of the application of this rule is found in the following case:

*Minnesota Tribune v. Associated Press* (8 C.C.A.) 83 Fed. 350:

A contract between an association engaged in furnishing news, and a certain newspaper company, provided, in its seventh paragraph, "that the rights, duties, and obligations of the parties hereto, except as hereinbefore specifically provided for, shall be *controlled and governed by the by-laws* of the said party of the first part," etc. The court held, that the effect of this was to make the *subsequent provisions* of the contract subordinate to the by-laws, so that the ninth paragraph, which provided that the news association

should not extend its news service to any publications not then entitled to receive the same, without the written consent of the other contracting party, was controlled and modified by a provision of the by-laws which provided that newspapers entitled to receive news service from certain old associations on a given date should be entitled to have service extended to them *without* the consent of the local members. The court said (p. 354):

“\* \* \* For the purpose of reaching a correct conclusion concerning the obligations imposed by the contract in question, it is clear, we think, that the contract should not be considered by itself, but should be construed in connection with the by-laws of the Associated Press. Reference is made to the by-laws in the contract, and the seventh paragraph thereof expressly declares ‘that the rights, duties, and obligations of the parties hereto, except as hereinbefore specifically provided for, shall be controlled and governed by the by-laws of said party of the first part, now or hereafter in force during the life of this contract.’ The necessary effect of this provision of the contract was to make the *subsequent provisions* thereof, including the ninth, subordinate to the by-laws. \* \* \*”

The “general” intent of the Rider to the Shipping Articles of the “CAPILLO” was clearly to serve as an interim document until applicable supplementary agreements covering the subject matter should be negotiated which would thereafter govern (98, 154). Such October Supplementary Agreements were negotiated, by the terms of which the situation here presented was fully covered. Unless the last paragraph

of the Rider contemplates the incorporation of the Decisions of the Maritime War Emergency Board, the provisions of the October Supplementary Agreements clearly cover the instant case in all respects. Appellants' brief, on page 33, referring to provision covering compensation after loss or internment of the vessel virtually admits this is the fact by saying:

“\* \* \* it may be possible to raise some argument on the Marine Cooks & Stewards agreement \* \* \* in that there was provision both in the rider and the supplementary agreement relating to the length of time that war bonus is paid.”

It being now agreed that *all* October Supplementary Agreements had such a provision, this concession must be widened to cover all four appellants. Not only is it “possible to raise some argument” to that effect, but we submit that it is clear that the October Supplementary Agreements in the case of all four appellants clearly *supplant* the Rider in case of conflict.

#### **War bonus—wages or not.**

The cases discussed on pages 35 and 36 of appellants' brief are wholly without point in this discussion. There is no suggestion made in this brief that bonus when earned under the terms of the Rider to the Shipping Articles is not supported by adequate consideration.

**The rider is valid where it incorporates a *negotiated* agreement even if subsequently made.**

On page 37 of appellants' brief there is a suggestion that the Rider is invalid under 46 U.S.C. 564. This is, of course, not seriously urged as without the

Rider there could be no claim at all for bonus. There are two cases cited in support of the proposition that changes in wage schedules shown in shipping articles are illegal.

*Jones v. United States* (D.C. Md.) 284 Fed. 721;

*The Howick Hall* (D.C. La.) 10 F.(2d) 162.

Each contained a clause in the Shipping Articles purporting to make wages subject to later change in rates of pay.

In both cases the reduction in the scale of wages shown on the shipping articles was by the subsequent *unilateral* action of the employer. Here, the first and last paragraphs of the Rider explicitly refer to and incorporate outside agreements — possibly made in the future through *joint* action of the representatives of the parties. In the last case, above, the court said:

“\* \* \* I have no doubt that, had the officers of the seamen’s unions and the shipowners’ association *reached an agreement*, both sides would have been bound by it, and the clause could have been given effect; but to allow the shipowner or the captain to arbitrarily reduce wages would be going too far, and to give the clause that meaning would render it void for lack of mutuality.”

**Under October supplementary agreements bonus only payable while employees are in the “war zones defined herein.”**

Appellants’ brief, page 42, discusses the provision in the October Supplementary Agreements that in case of loss or internment of the vessel,

“\* \* \* war bonus at the rate specified in sub-



division (b) of paragraph 1 hereof shall be paid while employees are *in the war zones defined herein.*"

The brief says,

"This paragraph provided for the payment of a bonus to the men while in the war zone. \* \* \*"

The brief *omits* the words "defined herein." The words "war zones" are specifically defined in the October Supplementary Agreements in the terms of "voyages" (119, 114). The brief continues:

"\* \* \* Nothing is said about any *voyage*; nothing said about any services on the vessel.  
\* \* \*"

This, again, is not accurate as war bonus was specifically *only* to be paid "while employees are in the war zones *defined herein.*" The *definition* is wholly in the terms of "voyages." As indicated in the foregoing, this refers to a period while employees are exposed to the risks of a "voyage." It has no reference to the location of any employee while on *land*.

**Decision No. 5, Revised, of Maritime War Emergency Board covers the subject matter when same is left open for *future* agreement.**

The quotations on pages 44 and 55 of appellants' brief concerning the retroactivity of Decision No. 5 are not accurate or complete. As reproduced in appellants' brief it has *omitted* the language italicized below:

"This Decision is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the making of payments provided for herein contained in ship's Articles en-

tered into on or before January 23, 1942, in the case of payments provided for in Articles 1 to 3, inclusive, hereof, February 6, 1942, in the case of payments provided for in Article 4 hereof, and February 21, 1942, with respect to payments provided for in Article 6 hereof, *or collective bargaining agreements in effect at the time when ship's articles were entered into as aforesaid, or where the making of such payments were expressly left open subject to later agreement either in the ship's articles or such collective bargaining agreements.*" (281-2)

It is on the italicized language making it applicable where the subject was "expressly left open subject to later agreement either in the ship's articles or such collective bargaining agreements," that the trial court found it applicable here under the last paragraph of the Rider.

**Rider to be construed against those who proposed and presented it.**

The following cases cited on page 46 of the brief are hardly helpful in this discussion:

*United States v. Westwood* (C.C.A., Va.)  
266 Fed. 696;

*The Catalonia* (D.C., Va.) 236 Fed. 554;

*Jansen v. Theodore Heinrich*, Fed. Cases  
7215;

*Wope v. Hemmingway*, Fed. Cases, 18042;

*The Disco*, Fed. Cases, 3922.

They have to do with agreements in which the parties were not dealing on *equal* terms at arms' length. Such is not the situation here. The Rider here was not

prepared by the owner and presented to the crew. No ignorant seamen and overreaching master or owner are involved. It was a rider carefully prepared by very well informed unions and presented by them to American Mail Line Ltd. Under familiar rules of construction the Rider should be most strongly construed against the party who drew and presented the document.

In *Flotation Systems v. United States* (9 C.C.A.) 136 F.(2d) 483, the court said:

“It is the rule in California that the words of a contract will be taken most strongly against the party who employs them.”

The court adopted the same rule.

The rule thus enunciated is also the rule in Oregon and in Washington.

*Hyland v. Oregon Co.*, 74 Ore. 1, 144 Pac. 1160;

*Foss v. Golden Rule Bakery*, 184 Wash. 265, 51 P.(2d) 405;

*Dorsey v. Strand*, 21 Wn.(2d) 217, 150 P. (2d) 702;

*Southern Railway Co. v. Coco Cola* (4 C.C. A.) 145 F.(2d) 304;

12 Am. Jur. 795.

In Restatement of the Law of Contracts, Sec. 236(d), the authors said:

“Where the words or other manifestation of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed unless their use by him is prescribed by law.”

*Northern Pacific v. Twohy Bros.* (9 C.C.A.)  
 95 F.(2d) 220, cert. den. 304 U.S. 575;  
 12 Am. Jur. 795.

**Previous negotiations of the parties are admissible in interpreting the rider.**

On page 46 of appellants' brief the following language is used:

"The admissibility of any evidence other than these agreements violates the parol evidence rule that all prior negotiations both oral and written, merge in the written agreement. \* \* \*"

This is a repetition of similar language on page 29 of the brief. The authorities on the subject are to the contrary of the above language and such negotiations are clearly admissible.

Restatement of the Law of Contracts, §228:

"An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted."

§242: "*Previous negotiations* between parties to an integrated agreement, whether the negotiations relate to that agreement or to another, *are admissible* to show that the agreement has any meaning which is not impossible under the standard stated in §230 though that meaning would not otherwise have been given to the agreement."

§230 reads as follows:

"The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably



intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration other than oral statement by the parties of what they intended it to mean.”

12 Am. Jur. 757:

“In the interpretation of a writing which is intended to state the entire agreement, *preliminary negotiations* between the parties *may*, however, *be considered* in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument. The purpose of considering their preliminary negotiations is to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract. If the previous negotiations make it manifest in what sense they understood and used those terms, they furnish the best definition to be applied in the interpretation of the contract itself.”

#### **Authority of union to modify the contract.**

On pages 47, 52 and 54 of appellants’ brief the authority of the unions to modify an agreement is questioned.

The references on pages 47 and 48 to the following authorities:

31 Am. Jur. 874;

*Ahlquist et al. v. Alaska-Portland Packers’ Ass’n.* (C.C.A. 9) 39 F.(2d) 348, 350;

*The Henry S. Grove* (D.C., Md.) 22 F.(2d) 444.

limiting the right of unions to modify individual agreements are not helpful in the instant discussion

for the reason that the Rider to the Shipping Articles on which appellants base their claim specifically provides in its opening and closing paragraphs that the "provisions" and "terms and effective date" of Supplementary Agreements to be *negotiated* between unions and Pacific American Shipowners Association are to govern the relationships of the parties. This is in line with the strong language of the Supreme Court of the United States in *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, at 338-9, where the court emphatically pointed out the present trend toward discouragement of individual agreements in favor of general collective bargaining agreements. The court said:

"But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. \* \* \* The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. \* \* \* We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. \* \* \*

“\* \* \* We know of nothing to prevent the employee's, because he is an employee, making any contract *provided* it is not *inconsistent* with a collective agreement or does not amount to or result from or is not part of an unfair labor practice.

\* \* \* ”

The Rider on bonus is certainly inconsistent with both the October Supplementary Agreements and the Decisions of the Maritime War Emergency Board.

Appellants argument on page 33 of their brief that the issues in this case are *not* between the Unions and the Association but between the crew and the operator is wholly without merit. The appellants, admittedly, are all members of the unions which made the October Supplementary Agreements (See Appellants' Brief, pp. 25, 29). The Rider incorporates the “provisions” and the “terms and effective date” of such supplementary agreements. Without incorporating the October Supplementary Agreements no contract at all exists and bonus would end when the vessel was lost.

At this point it may be well to emphasize the controlling character and uniform application of the *contracts* and *supplementary contracts* of the six maritime unions and Pacific American Shipowners Association. Testimony of W. L. Williams (110):

“Q. And when a ship would pay off, will you explain what governed the rights of the parties in case of dispute? A. The existing contract.

\* \* \* \* \*

“Q. And those contracts in every case, would they govern as to who was right or wrong? A. They would.” (111)

(134) “Q. (By MR. AMBLER): Mr. Williams,

referring to these contracts and the supplemental agreements which you have described and identified, were the crews of the various vessels of the American Mail Line which sailed out of the Columbia River governed by those contracts and supplemental agreements? A. They were. Q. And did you pay the crews in accordance with those? A. We did."

(153) "Q. The American Mail Line in the fall of 1941 had all of its vessels covered by agreements with the six Maritime Unions which are here mentioned? A. That is correct. Q. And it had no contracts with any other Unions during that period? A. It did not. Q. And all of its employees, seagoing employees, were covered by agreements with these six unions, is that correct. A. That is correct."

(155) "Q. (By MR. AMBLER): And all of your crews of all of your ships, during 1941 and before, did all of their collective bargaining through the Unions with the Association which represented your company? A. That is true. Q. And they were paid in accordance with these various agreements which were made between the unions, acting on behalf of the employees, and the Association, acting on behalf of the Employer, is that correct? \* \* \* A. That is correct."

(156) "Q. (By MR. AMBLER): Will you state whether or not all crews of all vessels of the American Mail Line, during the period of 1940 and '41, were governed by agreements and supplemental agreements entered into by the Pacific American Shipowners Association on behalf of the Employer, and the six Maritime Unions representing the seagoing personnel? A. They were."



**Invitation to the conference of August 12, 1941, and the introductory remarks of Commissioner Macauley are part of contract of August 16, 1941.**

On page 49 of appellants' brief appellee is criticized for attaching to Exhibit B (the contract of August 16, 1941) the invitation of Admiral Land to the meeting and the opening remarks of Commissioner Macauley. Without these exhibits the contract is incomplete as it provided in part,

"At a conference terminating on this 16th day of August, 1941 \* \* \*, to deal with the subject as announced by the Maritime Commission in the *attached* letters of invitation and statement made by Commissioner Macauley at the opening of the meeting on August 12, 1941, agreement was reached as follows:" (213)

**Circular of American Merchant Marine Institute, Inc.**

On page 51 of appellants' brief, the introduction of a Circular of August 18, 1941, of the American Merchant Marine Institute, Inc., to its members is criticized. It is interesting as a contemporaneous construction of the agreement of August 16, 1941, to which all of the October Supplementary Agreements relate made long before a dispute had arisen. The pertinent portion of the Circular is as follows:

"\* \* \* The new agreement provides for continuance of basic wages and temporary emergency wages in case of internment, until arrival back in the United States, *but payment of bonus does not continue under such circumstances.*" (224)

**Later general agreements are expressly incorporated by the rider.**

It is quite true, as stated on page 57 of appellants' brief, that a general agreement between an association and unions does not become binding until adopted by the parties concerned. The quotation from *Clark v. Claremont Apt. Hotel Co.*, 19 Wn.(2d) 115, 122, 123, 141 P.(2d) 403, appears to state the general rule. The opening and closing paragraphs of the Rider, however, in this instance show a specific adoption of later negotiations by the parties concerned. The fact that these later negotiations may in certain respects result unfavorably to the parties concerned is immaterial. This is well illustrated in the *Clark* case. There a general agreement between apartment house owners and the union provided for a wage of \$125.00 a month. About a month following the execution of the general written agreement an oral agreement was made between an apartment house operator and the union covering Mr. Clark, by the terms of which his previous compensation was raised about \$22.00 a month, but fell short of the \$125.00 a month general wage, the reason for the differential resting on a variety of causes including the age of the plaintiff. In ruling against the plaintiff who sued for the difference between the amount he received and the amount provided under the general contract, the court said:

“\* \* \* The appellant has not been injured by the oral contract; he has, in fact, been benefited thereby to the extent of twenty-two dollars a month. *If he takes the benefit of that contract, he must likewise be governed by its limitations.*”

Appellants have taken the benefits of the increased rates and coverage of the October Supplementary Agreements.

This same rule is recognized by the language of the first and last paragraphs of the Rider which clearly contemplate that the parties shall be governed by the “provisions” and the “terms and effective date” of general agreements. The suggestion contained on pages 7, 31 and 32 of appellants’ brief that only the increased “rate” of the Supplementary Agreements *without* all the accompanying “provisions” and “terms” should be applied is wholly untenable.

### CONCLUSION

In conclusion, we submit that the decision of the trial court in finding that the Rider to the Shipping Articles of the “CAPILLO” incorporated the Decisions of the Maritime War Emergency Board is correct and the judgment below should be in all respects affirmed.

In the *alternative*, and only if the above is not the view of this court, we submit that the decision of the trial court should then be modified by finding that the Rider to the Shipping Articles incorporated the “provisions” and the “terms and effective date” of the October Supplementary Agreements, such modification resulting in the following changes in the judgment of the court below:

1. Disallowance to each appellant of the sum of \$14.67, granted by the court below.
2. Reduction of repatriation bonus to each appel-

lantlant by 20%, to-wit, from \$273.33 to \$218.66.

In all other respects the trial court should be affirmed.

Respectfully submitted,

JOHN AMBLER,

GROSSCUP, AMBLER & STEPHAN,

*Proctors for Appellee.*

October 29, 1945.





## APPENDIX

### October Supplementary Agreement Covering "Marine Cooks"—Appellee's Exhibit A-4 (119).

THIS AGREEMENT, dated October 10th, 1941, by and between the Marine Cooks and Stewards' Association of the Pacific Coast hereinafter referred to as the "Union" and the Pacific American Shipowners Association, a corporation, acting on behalf of the companies whose names are subscribed hereto.

#### WITNESSETH:

WHEREAS, a collective bargaining contract between the parties dated July 5, 1940, and which has been automatically renewed until September 30, 1942, specifically provides among other things for the establishment of bonuses and other special benefits on vessels going into war zones; and

WHEREAS, in a proceeding before the National Defense Mediation Board between certain other parties the National Defense Mediation Board published recommendations for bonuses for war risk to apply for a period hereinafter specified in this agreement; the parties hereto desire to adopt and follow said recommendations;

NOW, THEREFORE, It is agreed that said recommendations of the National Defense Mediation Board are adopted by the parties hereto and in pursuance thereto do agree as follows:

1. The following war bonus rules shall govern the parties hereto —

(a) There shall be five war zones; namely:

- I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States

ports via Indian and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th Meridian, eastbound, and thereafter no further bonuses will be payable.)

II. Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage).

III Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until re-crossing the same Meridian eastbound).

IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound).

V. Canada (Atlantic Coast). (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port).

(b) Members of the Union shall be paid a war risk bonus at the rate of \$80 per month in the first four areas and \$33 in the fifth area provided, however, that all members of the Union entitled to receive basic monthly wages in excess of \$120, shall, in lieu of the bonuses specified above be paid at the rate of 66  $\frac{2}{3}$ % of the basic monthly wages in effect on the date hereof in the first four areas and 25% of the basic monthly wages in effect on the date hereof in the fifth area; a schedule of such bonuses is attached hereto and made a part of this agreement.

(c) There shall be paid to members of the Union in addition to the area bonus just provided, the following port bonuses:

- (1) for the port of Suez, or any other port which is subject to regular bombing, \$100, plus \$5 per day for each day beyond five days that the vessel is in that port.
- (2) for any port in the Red Sea or in the Persian Gulf not covered by paragraph (1) *supra*. \$45.

The same bonuses shall be paid other unlicensed personnel.

The foregoing bonus rules shall be and remain effective until November 1, 1942, unless adjusted prior thereto pursuant to the provisions of this agreement.

2. The following machinery for making equitable future adjustments shall govern the parties hereto—

- (a) Either party may ask for a change, an addition to, or subtraction from the present war bonus rules set forth above if the present situation is changed by an Act of Congress, executive action, the spread or contraction of the area of hostilities in the Eastern or Western hemisphere, the entry into the war or withdrawal from the war of belligerents, or the rise or fall of sinkings of American vessels. Such proposed change shall be limited to the areas where conditions are alleged to have changed.
- (b) The party asking for the change shall present a request in writing to the party from whom the change is sought. Meetings shall be held at once. If agreement between them is not reached within one week after the date of such request either party may present the matter to the United States Department of Labor, Division of Conciliation, for conciliation. If conciliation is not successful within one week after the matter has been presented to the Division of Con-



ciliation, the Director of the Division may then refer the matter to a Board composed of three disinterested parties to be appointed by the President of the United States. Such Board shall have power to make recommendations.

- (c) In the event the parties are unable to agree concerning war bonus rules which shall apply on and after November 1, 1942, the procedure set forth in subdivision (b) of this Section 2 shall be followed in determining the same.

3. This agreement shall remain in effect until November 1, 1943.

4. War Risk Insurance in the sum of \$5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement.

In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00.

5. During the period of these recommendations there shall be in connection with and on account of war bonus issues, no lockout, strike, slow-down, or like

action by either owners or men represented by the parties hereto.

6. The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941, or upon any voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles.

7. If any dispute shall arise concerning interpretation of said recommendations of the National Defense Mediation Board or any provision of this agreement and if the parties cannot adjust any dispute by agreement then either party may refer it to the Division of Conciliation for conciliation and if conciliation fails either party may refer the matter to the three-man Board referred to in paragraph 2 (b) hereof for interpretation.

PACIFIC AMERICAN SHIPOWNERS ASSOCIATION  
(Sgd.) J. B. BRYAN, *President*

MARINE COOKS AND STEWARDS' ASSOCIATION  
OF THE PACIFIC COAST  
E. F. BURKE

DATED: October 10, 1941

Acting on behalf of the steamship lines named below:

Admiral Oriental Line

American-Hawaiian Steamship Company

American Mail Line

American President Lines, Ltd.

Alaska Steamship Company

Alaska Transportation Company

Coastwise Pacific Far East Line

W. R. Grace & Co (as Agents for Grace Line, Inc.

Pacific Coast West Coast Mexican Central

American Panama Service of Grace Line, Inc.)

and (Pacific Coast South American Service of  
Grace Line, Inc.)

Luckenbach Gulf Steamship Company, Inc.

Matson Navigation Company

The Oceanic Steamship Company

McCormick Steamship Company

(East Coast-South American Service)

(Pacific Coast-Porto-Rico-West Indies Service)

(Intercoastal Service)

Northland Transportation Company

Pacific Lighterage Corporation

Pacific Republics Line

(Moore-McCormack Lines, Inc.)

Santa Ana Steamship Company

States Steamship Company

Pacific-Atlantic Steamship Company (Quaker Line)

Sudden & Christenson

(Arrow Line-Intercoastal Service)

Shepard Steamship Company

The Union Sulphur Company, Inc.

Weyerhaeuser Steamship Company

No. 11100

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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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EDWARD J. STEEVES, HUGO CALGAN, WILLIAM  
A. PORTER and SAMUEL S. TAYLOR,  
*Appellants,*

vs.

AMERICAN MAIL LINE LTD., a corporation,  
*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION.

---

BRIEF OF AMICI CURIAE

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JOHN GEISNESS,  
BASSETT & GEISNESS,  
*Amici Curiae.*

811 Alaska Building,  
Seattle 4, Washington.

FILED

1945

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PAUL P. O'BRIEN,  
CLERK





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IN THE  
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FOR THE NINTH CIRCUIT

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vs.		
AMERICAN MAIL LINE LTD., a corpora- tion, <i>Appellee.</i>		

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UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae represent the licensed personnel of the SS "CAPILLO" on the voyage involved in the instant case, excepting only the captain and the chief engineer. The rider attached to the shipping articles applies, of course, to the licensed personnel as well as to the appellants and other unlicensed crew members. The appellants were repatriated at an earlier date than other crew members. The licensed crew members represented by amici curiae, finding the instant suit pending when they returned, have held their claims in abeyance because, unless new facts unexpectedly develop or the decision on appeal rests upon some theory not now within our contemplation, the

outcome of this case should determine their right to bonus for the period of their imprisonment. At the very least, the licensed personnel have a direct and substantial interest in the pending appeal.

### STATEMENT OF THE CASE

The case before the court has been stated by both appellants and appellee. We will not restate it in full, but will set forth only those matters that we consider necessary to a connected argument and as to which a ready reference in this brief may be a convenience to the court.

The articles of the SS "CAPILLO" signed October 11, 1941, bore an attached rider containing three sentences upon which the present case hinges:

"The American Mail Line agrees to pay an emergency war bonus to the crew of the S.S. Capillo, Voyage Six (6), in accordance with the provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various Marine Unions.

"In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and bonus to the date members of the crew arrive in an United States port, on the Pacific coast; furthermore, the company agrees, in such event, to arrange for repatriation of such men to a United States port on the Pacific Coast.

\* \* \* \* \*

"It is further agreed that in the event of any

increase in pay, overtime or war bonus or changes in insurance which may be granted, as the result of negotiations between the Union and the Pacific American Shipowners' Association, the company will be governed by the terms and effective date of any agreement so reached."

In the course of the voyage the crew was imprisoned for war causes and the crew members ask that the bonus be paid to them to the date they arrived in a United States port on the Pacific Coast. A glance at the second sentence of the rider would appear to confirm unqualifiedly their right to the bonus for such period, but the appellee has contended throughout the case that the second sentence must be read with the first and third sentences quoted above and in the light of negotiations, agreements and decisions preceding and subsequent to the execution of the articles, and that when so read appellants should be found entitled to bonus only until destruction of the ship December 29, 1941.

Appellants urge that attention should be confined to the rider itself, but for the sake of this argument we will assume that all of the evidence admitted by the trial court was properly admitted, believing that the total effect of such evidence is to confirm the right asserted by the crew members to war bonus throughout their period of imprisonment.

The form of the rider involved in this case was first used in August, 1941 (Aps. 105). It was proposed by the unions representing the various categories of personnel on American Mail Line ships and accepted by the American Mail Line (Aps. 106).



Thus, while the articles with the rider constitute a contract between each individual crew member and the ship operator, the rider was concurred in by the collective bargaining agents of the employees. Apparently the unions directly participated upon each occasion of its use (Aps. 109).

At the time the rider was developed there were in effect agreements between the Pacific Coast unions and the operators, referred to as supplementary agreements, treating specially with adjustments in compensation of seamen to meet the impact of war conditions upon the nature of the seamen's calling. As emphasized by appellee, these supplementary agreements not only were not uniform but were deemed insufficient by seamen of all categories, and hence, the unions demanded and the American Mail Line agreed that aside from such supplementary agreements there should be incorporated in the contract between individual crew members and company, evidenced by the shipping articles, the special stipulations found in the rider.

The last Pacific Coast supplementary agreements entered into prior to October 9, 1941, by unions representing unlicensed personnel were dated May 19, 1941 (Aps. 132-133). The latest Pacific Coast supplementary agreements applicable to licensed personnel prior to October 15, 1941, were dated August 16, 1941 (Aps. 166-167). Between October 9 and October 16, 1941, each of the several Pacific Coast maritime unions entered into a separate supplementary agreement with the operators (Aps. 133). The agreements reached between the operators and the unions repre-

senting the appellants were entered into on October 9 and October 10.

It is said that the agreements of October 9 and 10 were not known to the parties to the instant case when the articles of October 11, 1941, were signed (Appellee's brief, p. 24). On the other hand, there was no basic change in the situation and nothing to compel the conclusion that the rider would not have been appended to the articles had the parties known of those general agreements. There was a difference of degree in that the October agreements granted additional benefits and reached further toward achieving uniformity, although appellee does not contend that even substantial uniformity was achieved as to all United States seamen until December, 1941 (Appellee's brief, p. 26). Too, the appellee brings out that the October agreements for the first time expressly dealt with the subject of payment of war bonus to unlicensed personnel after discontinuance of a voyage due to war causes. The prior supplementary agreements with unlicensed personnel failed to deal expressly with the subject, but the August 16, 1941, agreement with licensed personnel did so (See Aps. 146, 216; Resp. Ex. B) and the licensed personnel nevertheless continued to demand and secured the attachment of the rider, applicable as well to them as to other crew members.

The general situation developed by the record respecting the Pacific Coast unions and their members was that for long prior to October 11, 1941, and to and including that date there were effective successive supplementary agreements, each generally ap-

plicable to the membership of a particular Pacific Coast maritime union, and that when it developed that the benefits accorded by the effective supplementary agreements were not sufficient to induce seamen to man the ships of the American Mail Line, the prospective crew members with the assistance of their unions entered into a special agreement evidenced by rider attached to the articles, giving the benefit of future collective agreements with certain independent guarantees. It cannot be said that the October agreement brought any essential change in the situation, even if we indulge, as we should not, appellee's assumption that the rider contemplated and was conditioned upon some expected agreement that would work a basic change.

Certain of the provisions of the October agreements should perhaps be quoted here because we sharply disagree with the appellee's interpretation of that portion of the October agreements relating to the payment of war bonus after discontinuance of a voyage due to war causes. So far as concerns the present argument, the October agreements were alike (Appellee's Brief, p. 52). A sample October agreement is set forth in the appendix to appellee's brief and also in Apostles on Appeal, pages 119 to 126. In numbered paragraph 1(a) of the agreement, war zones are established:

"1. The following war bonus rules shall govern the parties hereto—

"(a) There shall be five war zones; namely:

"I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coast of Africa, Red Sea,



Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States ports via Indian and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th. Meridian eastbound, and thereafter no further bonuses will be payable.)

“II. Trans-Atlantic voyages to Russian (Archangel, etc.) (Whole voyage).

“III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th. Meridian westbound, until recrossing the same Meridian east bound.)

“IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound.)

“V. Canada (Atlantic Coast). (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port).”

In numbered paragraph 1 (b) general provision is made for payment of war bonus:

“(b) Members of the Union shall be paid a war risk bonus at the rate of \$80 per month in the first four areas and \$33 in the fifth area provided, however, that all members of the Union entitled to receive basic wages in excess of \$120, shall, in lieu of the bonuses specified above be paid at the rate of 66 2/3% of the basic monthly wages in effect on the date hereof in the first four areas and 25% of the basic monthly wages in effect on the date hereof in the fifth area . . . ”

In numbered paragraph 4, the matter of compen-



sation after discontinuance of a voyage due to war causes is specifically treated:

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein."

Following the October agreements and at varying dates, certain further agreements were reached by the Pacific Coast unions and shipowners (Aps. 134) but these were basic agreements, providing increases in basic pay and not directly relating to war bonuses.

After the United States became at war, the unions and operators of both coasts agreed that a Maritime War Emergency Board should settle all questions in dispute between the maritime unions and operators and that its decisions should be final and binding (Exhibit K, Aps. 199-206).

Decision No. 2 of the Board classified war risk voyages and increased the bonus rate. It contained no provision respecting payment during internment (Exhibit A-10, Aps. 270 et seq.).

A succeeding decision numbered 5, as amended February 17, 1942 (Exhibit A-12, Aps. 287 et seq.) provides for payment of bonus after loss of a vessel during exposure to marine perils. Decision No. 5,

with its amendments, was consolidated into Decision No. 5, revised, issued February 21, 1942 (Exhibit A-11, Aps. 280). This decision of the Maritime War Emergency Board was by its terms:

“retroactive to December 7, 1941, in all cases where there was no agreement with respect to the making of payments provided for herein contained in ships Articles entered into on or before — February 21, 1942, with respect to payments provided for in Article 6 hereof or collective bargaining agreements in effect at the time when ship’s articles were entered into as aforesaid, or where the making of such payments were expressly left open subject to later agreement either in the ship’s articles or such collective bargaining agreements.”

Article 6 pertained only to the subject of the continuance of war bonus payments after loss or internment of a vessel. These decisions do not expressly say that bonus shall *not* be paid during imprisonment.

Upon repatriation, appellants were paid by appellee war bonus of \$80.00 per month to December 29, 1941, the date the ship was lost. Appellee very evidently paid on the assumption that the October agreements applied both as to amount and period and did not authorize payment for any period following loss of the ship. Later, in excepting to the original libel appellee urged that the board’s decisions could not apply, and the proctor for respondent stated at the opening of the trial (Aps. 81):

“It is further stipulated that if the libelants are entitled to recover, each is entitled to bonus at the rate of \$80.00 per month. It is also agreed

that the libelants have been paid their wages and emergency increase during the entire period until their arrival in New York; that they have been paid overtime; that they have been paid an attack bonus as provided in the supplemental agreements.

"It is also agreed that they were paid war bonus from the time the vessel crossed the 180th Meridian westbound, in accordance with the supplemental agreements in effect then, until the date when the vessel was sunk in Manila Harbor, December 29, 1941." (Aps. 81)

Appellee did not pay bonus for the period of the repatriation voyage on the "GRIPSHOLM". This would also seem to reflect its theory that the October agreements apply and its interpretation of those agreements. Appellee indicates that this payment was withheld on the ground that by reason of international protection travel on the "GRIPSHOLM" did not involve war risk, but it must be said that this suggestion is scarcely credible in view of its position in paying off and before the trial court. On the face of it, it is much more reasonable to assume that non-payment was prompted by appellee's theory as to the interpretation and application of the October agreements.

The trial court added bonus for the repatriation voyage and increased the rate of bonus to \$100.00 per month, the amount fixed by the Board's decisions.

It may fairly be said that the appellee's conduct respecting war bonus up to the time of this appeal was consistent with the theory that the October agreements, not the Board's decisions, applied both to

determine the rate of bonus and the period for which it should be paid. The trial court applied the Board's decisions to fix the bonus rate and period for which it should be paid.

### SUMMARY OF ARGUMENT

If possible, every part of the contract should be given effect, all parts should be made to harmonize and no part should be rendered superfluous. General clauses are subordinate to special clauses. Under these rules, there was an unchanging commitment to pay war bonus throughout the period of imprisonment. No collective bargaining agreements were intended to, nor could they, subtract from this commitment.

### ARGUMENT

#### Basic Aids to Construction and Their Application to this Case

Beginning at p. 56 of its brief, appellee states, with supporting authority, the general rule that the main purpose of the parties should, if possible, be followed in construing a contract. We agree as to the general proposition, but disagree as to the main purpose and meaning of the rider in question. It is our contention that the main purpose and meaning of the rider was to assure to the crew members war bonus payments throughout any period of internment or imprisonment at rates fixed by applicable supplementary agreements in effect when the rider was signed, together with *increases* later accorded by negotiation. We will shortly discuss the circumstances which we



believe give rise to this interpretation, but will first discuss certain recognized aids in the construction of contracts that also guide us to the same meaning.

It is well established that all parts of a contract are, if possible, to be given meaning and no part is to be treated as surplusage. In *Ladd v. Ladd*, 8 Howard 10, 12 L. ed. 967, the court said:

“By every sound rule of construction, an instrument should be interpreted by the context, so as if possible to give a sensible meaning and effect to all its provisions; and so as to avoid rendering portions of it contradictory and imperative, by giving effect to some clauses to the exclusion of others.”

In *E. I. Dupont de Nemours & Co. v. Claiborne-Reno Co.*, 64 F.(2d) 224, 89 A.L.R. 238, the Circuit Court of Appeals for the Eighth Circuit said:

“If possible, a court will give effect to all parts of an instrument and a construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable.”

See also:

*The Nicholson Pavement Co. v. Jenkins*, 81 U.S. 452, 20 L. ed. 777;

*Burdon Central Sugar Ref. Co. v. Payne*, 167 U.S. 127, 42 L. ed. 105;

*Sattler v. Hallock* (N.Y.) 54 N.E. 667;

*Stone v. Robinson* (Tex.) 180 S.W. 135;

*Andrew Jergens Co. v. Woodbury, Inc.*, 273 Fed. 952, 959, Affirmed 279 Fed. 1016, Cert. Den. 260 U.S. 728, 67 L. ed. 484;

*Hammett Oil Co. v. Gypsy Oil Co.* (Okla.)  
218 Pac. 501, 506;

Williston on Contracts (Rev. Ed.) Sec. 619,  
p. 1781;

Page on Contracts (2d Ed.) p. 3525, Sec.  
2040;

12 Am. Jur., p. 772, Sec. 241.

The foregoing rule of construction takes all force from appellee's argument that the rider incorporated that part of the October agreements prescribing the period during which war bonus should be paid, thereby negating the right to war bonus during periods of internment, under appellee's interpretation of the October agreements. One trouble with that argument is that it renders the second sentence of the rider meaningless. Appellee will respond that the parties did not know of the October agreements when the rider was signed and, therefore, did not know they were using a meaningless sentence in the rider. However, this will not hold water because the preceding supplementary agreements likewise contained no specific provision for payment of war bonus during internment and, therefore, according to appellee, did not authorize such payment (see appellee's brief, p. 44), so we would reach the same result by incorporating the prior May agreements. Further, when appellee argues that the first sentence of the rider incorporates in full future agreements, (Appellee's brief, 34), it plainly writes out the last sentence.

Another reasonable and well established rule of construction is that where a contract contains one

clause particularly relating to a specific subject matter and also contains a general clause dealing with several matters including the subject matter of the specific clause, the general clause will be subordinate to the specific clause. In 12 Am. Jur. p. 779, sec. 244, this rule is well stated:

“As a rule, where in an agreement there are general and special provisions relating to the same thing the special provisions control. When the parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought.”

*Mutual Life Insurance Co. v. Hill*, 193 U.S. 55, 48 L. ed. 788, a case arising from the District of Washington, dealt with a question bearing a close analogy to the instant case. There a life insurance policy contained express provision that the company assumed no responsibility for notice to policy holders of premiums due. The policy also contained a provision that the contract should be held and construed at all times and places to have been made in the City of New York. A statute of New York forbade forfeiture of any life insurance policy without notice. In holding that the specific clause of the contract was the controlling clause, the Supreme Court said:

“The ordinary rule in respect to the construction of contracts is this: That where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general

in its terms, although within its general terms the particular may be included. Because, when the parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent; whereas a reference to some general matter within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought. Here, when the parties stipulate that no other notice shall be required, attention is directed to the particular matter of notice. When the stipulation is that the contract shall be construed to have been made in New York, no particular statute is referred to, and the attention may not be directed to the matter of notice or any other special feature of New York law. The special controlled the general; that which must have been in the minds of the contracting parties controls that which may not have been, although included within the language of the latter stipulation. This is the general rule in the construction of all documents — contracts as well as statutes.”

See also:

*Thomas v. Matthieassen*, 232 U.S. 221, 58 L. ed. 577;

Vol. I, American Law Institute Re-Statement, Contracts, Sec. 236;

Williston on Contracts (Rev. Ed.) Sec. 619, p. 1784, n. 12.

Here, the rider specifically provides that “in the event the \* \* \* crew be \* \* \* imprisoned \* \* \* the company agrees to pay bonus to the date members of the crew arrive in a United States port, on the



Pacific Coast.” This provision of the rider specially dealing with the single subject matter plainly dominates as to that single subject matter the general clauses incorporating, by reference, terms of other agreements.

This is an appropriate place to speak of *Minnesota Tribune v. Associated Press* (C.C.A. 8) 83 Fed. 350, a case relied upon rather strongly by the appellee. That case involved a contract containing in its seventh paragraph a provision that “the rights, duties, and obligations of the parties hereto, except as hereinbefore specially provided for, shall be controlled and governed by the by-laws of said party of the first part, now or hereafter in force during the life of this contract”. By reason of this particular form of language, the court said that “the necessary effect of this provision of the contract was to make the subsequent provisions thereof, including the ninth paragraph, subordinate to the by-laws”. The sense of the decision is that the parties, by excepting specific provisions occurring *before* the seventh paragraph, said in effect that the by-laws would control even specific provisions of the contract occurring after the seventh paragraph. Were this not the sense of the decision it would, of course, be contrary to the well established rule we have just discussed. We hardly think the court was ignorant of that basic rule of construction and certainly indicated no intention to set it aside, but rather considered the case to be one to which, by reason of the special language we have quoted, the rule did not apply.

### True Meaning of the Rider

It is the substance of appellee's contention, as we read its brief, that the rider in question was conceived in anticipation of general agreements that would accord satisfactory adjustments in war compensation, would be uniform in their application, and would deal directly with compensation during imprisonment or internment, and that the rider was designed and intended to incorporate the whole of such general and uniform arrangements regardless of conflict with the specific provision of the rider upon which appellants base their case. As we have shown, this argument runs foul of basic established principles that should govern the interpretation of contracts. Furthermore, entirely aside from those principles, appellee's inference from the circumstances as to the meaning of the parties is not reasonable.

The appellants, their fellow crew members and crew members previously signing articles bearing the rider in question were departing to be in war zones exposed to unusual hazards for undetermined periods. They knew that there were general contracts in effect between their respective unions and the American Mail Line providing certain compensation for war risks. They were dissatisfied with the compensation so provided and were unwilling to sail without assurance of greater benefits. They knew, too, that negotiations were almost continuously being conducted between the unions and the ship operators, that a series of special and general agreements had been reached and that further agreements would no doubt be reached in the future. As we read the rider, they

met the situation as one would naturally expect, by demanding (1) that they be paid war risk compensation in accordance with the applicable supplemental agreements in existence at the time they signed the rider (first sentence of rider); (2) that no matter what agreements had been or might be made they be paid wages and bonus during any period of internment or imprisonment (second sentence of rider); and (3) that in the event wages or war bonus should be increased, the increases would be applicable to them (last sentence of rider). They did not intend to limit themselves to the war compensation accorded by existing agreements, nor did they intend to place themselves subject to all the provisions of whatever future agreements might be made. They would not sail without being assured that they would be paid wages and bonus during any period of imprisonment and that they would not be subject to any decrease in bonus or wages but only to increases.

It will be noticed that this interpretation gives a distinct meaning to each of the three sentences under scrutiny and gives force and effect to the specific provision for bonus payments during imprisonment in spite of the general references in the other two sentences to independent collective agreements.

We submit that the interpretation we urge is the only sensible interpretation that gives effect to all parts of the rider. Appellee's argument hopelessly fails to do so. It is argued by Appellee that the phrase "applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various marine unions," as used in the first



sentence of the rider, refers not only to those in existence at the time the articles were signed but to those that might come into existence in the future. (See pp. 32 to 38 of appellee's brief). It is at once apparent that this interpretation denies meaning to the last sentence of the rider. Further, the necessary, and apparently the intended, import of appellee's argument is that the rider supplanted itself by existing and future agreements (See pp. 32-38 and 71-72 of appellees' brief). This construction plainly writes the second sentence out of the rider.

In this connection, it must be remembered that none of the May, August and October agreements expressly provided that no bonus should be payable for periods of imprisonment ashore. Appellee does not contend otherwise but argues that none of those agreements provides for such compensation and for that reason it is not collectible under any of them. It follows that, since all agreements, according to appellee, deny war bonus during imprisonment in a like manner, incorporation into the articles of any of the agreements would, if we follow appellee, deny war bonus during periods of imprisonment ashore, so that the second sentence of the rider, if appellee is right, never had nor could have force.

The basic defect in appellee's argument is that it assumes that appellants must adopt all or none of the provisions of supplementary agreements. It is baldly asserted by appellee on p. 72 of its brief that it is "wholly untenable" to apply the increased rate of compensation found in the supplementary agreements without applying all of the other pro-



visions of those agreements and excluding the rider. On the contrary, it is not only tenable to do so but it is the only tenable thing to do. Otherwise, we must assume that by accepting the supplementary agreements in the first sentence of the rider they would necessarily have barred themselves from taking the benefit of the second sentence, even had the October agreements, unknown to them October 11, 1941, never been adopted. For this and for the other reasons we have already discussed, it seems very clear that what the parties meant to do and what they did do was provide that the crew members should be paid in accordance with current supplementary agreements; that in addition to any stipulations in the supplementary agreements they should be paid bonus during internment; and that they should have the benefit of any increases in bonus accorded by subsequent agreements.

And assuming that appellee can reconcile with its argument any theory under which the second sentence of the rider ever had or could have any meaning at all, its argument necessarily implies that when the crew of the "CAPILLO" signed articles containing the express stipulation that war bonus should be paid to them throughout any period of internment despite the failure of existing collective bargaining agreements to provide such compensation during such periods, they were also agreeing that if in a day or a week or a month or a year another collective bargaining agreement should be reached containing some increase in rates but likewise denying bonus during imprisonment, the specific protective clause they had

insisted upon in the rider would be out of the window and they would be entitled to no bonus during imprisonment. After all, what we are ultimately interested in is the intention of the parties and specifically the intention and understanding of one party which must have been comprehended by the other. It seems too plain for argument that the crew could not possibly have intended any such possibility and that the American Mail Line must have known well enough that there was no such intention. The crew members believed that, come what might, they would be entitled to bonus during imprisonment at current or increased rates. They confidently computed their bonus during imprisonment and have now been told that by reason of a wholly artificial and untrue implication gratuitously drawn from a general background of collective negotiations and agreements, they are to be denied that which they required to be specifically promised them as a condition of their sailing.

The appellee's whole argument rests upon the assumption that the articles bearing the rider were signed in contemplation of some uniform and satisfactory general agreements by which the crew expected to be bound. The October agreements are acclaimed by appellee as those for which seamen had been waiting and it is concluded that the intention of the rider was to adopt every part of those agreements and discard inconsistent stipulations in the rider. It is said that "the 'general' intent of the rider to the shipping articles of the CAPILLO was clearly to serve as an interim document until applicable supplementary agreements covering the subject mat-

ter should be negotiated which would thereafter govern (98, 154). Such October supplementary agreements were negotiated, by the terms of which the situation here presented was fully covered."

There is nothing to support appellee's assumption as to the general intent of the rider. The very apparent intent was to secure wages and bonus at the going rates, together with future increases, and to have both wages and bonus during any period of imprisonment.

### **Meaning of the October Agreements**

Appellee contends that the October agreements negative the right to bonus during imprisonment. This is said to be true because the October agreements provide that bonus shall be paid while in the defined war zones and the term "war zone" is taken by appellee to mean only a "voyage" in certain waters, so that when the voyage ends with loss of the vessel, the war zone ends. This interpretation is plainly open to objection because the agreement does not in any sense say that a zone is a voyage but says, in substance, (Par. 1 (a) that respecting a voyage of the type here in question, the vessel is in a war zone after crossing the 180th Meridian westbound until re-crossing the same meridian eastbound. The agreement next (Par. 1 (b) provides generally that bonus shall be paid at stipulated rates in the "areas", and in an entirely separate paragraph (Par. 4) provides:

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective



bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein."

It is at once apparent that if appellee's interpretation of the second quoted sentence is correct, the sentence is nugatory. It would mean no more than to say that crew members should be entitled to bonus while in one of the war zones and in the course of the voyage. Exactly that much, at least, had already been said in the earlier provision of the contract to which we have already referred. In view of the existence of that prior provision and also in the light of the paragraphing and context, it is crystal clear that the quoted paragraph was intended to apply to those cases in which a vessel discontinued a voyage as a result of war operations. Applying appellee's interpretation, the second sentence of the quoted paragraph is a promise that the operators, for periods following discontinuance of voyages, will pay war bonus during continuance of voyages. Of course, the common sense interpretation of the October agreements is that on voyages into certain areas, the war bonus will be paid, and that in the event such a voyage is discontinued, the seamen will be paid war bonus while in those areas in which a crew, if voyaging therein, is entitled to bonus. The rider goes a relatively small step further to assure bonus until return to the Continental United States.



Appellee attempts to show the difficulties of applying such an interpretation by pointing out that the appellants did not return westbound across the 180th Meridian and, therefore, never literally left the area (p. 43 of appellee's brief). This type of argument is perhaps best answered by pointing out that similar difficulties of interpretation may be encountered in connection with westbound voyages that continue westerly into non-bonus waters. We believe the authors of the October agreements would probably respond that while their agreements might be more precise in their definition of war zones, the possibility that a crew might receive bonus while in a certain location provided they approached it from one direction rather than another is an unreasonable conclusion that it should be possible to dispel by common sense interpretation without its being literally treated in the agreement.

And, as we have already argued, even if appellee's interpretation of the October agreements respecting payment during imprisonment were correct, the outcome of this case could not be affected, because no matter what provision may be contained in the supplementary agreements, the rider insures to the men payment of bonus during such periods.

### **Decisions of Maritime War Emergency Board**

The assumption of the court and the argument of appellee (on appeal only) is that the decisions of the Board were negotiated agreements because they stemmed from a collective agreement that the decisions should be binding. It follows that if our argument is valid that the rider insures bonus during

imprisonment no matter what agreements may subsequently be made, that argument is equally valid as applied to the decisions of the Board. If they enter the case at all, they enter it as agreements and have no independent force.

In addition, it appears that the critical decision, Decision No. 5, revised, was not, by its terms, to be effective as to the voyage in question. It was declared to be retroactive to December 7, 1941 in certain cases. While the provision of the decision relating to effective dates is rather involved, the apparent meaning, so far as material here, is that with respect to Article 6, the part pertaining to war bonus payments after loss or internment of a vessel, the decision was to be effective as of December 7, 1941 in cases where neither ships articles entered into on or before February 21, 1942 nor collective bargaining agreements in existence when such articles were entered into contained provision respecting payment of war bonus after loss of the vessel, or where either the articles or the agreement expressly provided that the making of such payments should be left open for later agreement.

We understand that appellee's interpretation of the above-mentioned part of the decision pertaining to the effective date is in accord with what we have just said as to our own. Appellee proceeds to argue that this case falls within the very last clause of the provision because, according to appellee, "the making of such payments" was "expressly left open subject to later agreement . . . in the ships articles." This argument is unsound. The ship's articles left partially

open for adjustment (upwards only) the *amount* of the bonus but did not leave open the "making of such payments". Furthermore, Article 6, the clause claimed by appellee to be retroactive under the provision we have mentioned, does not relate to the *amount* but only defines the periods during which bonus shall be payable after discontinuance of a voyage due to war causes, which makes it clear that when reference is made to "*the making of such payments*" being left open, the Decision does not deal with a case where the *amount* was left open but deals only with cases where the *right* to bonus following loss or internment of the vessel, irrespective of *amount*, was expressly left open, the *right* to bonus under those conditions, not the *amount*, being the subject matter of Section 6.

It is certainly beyond argument that the *right* to bonus after loss, destruction, or abandonment of the vessel was not expressly left open. Quite the contrary was true.

Finally, it has been said by the Supreme Court that if there is doubt as to the meaning of a contract, the practical construction placed upon it by the parties "is an aid that may always be called in" (*Steinbach v. Stewart*, 78 U. S. 566, 20 L. ed. 56), is "of weight" (*U.P.R. Co. v. Hall*, 91 U.S. 343, 23 L. ed. 428), is "always a consideration of great weight" (*Brooklyn Life Insurance Co. v. Dutcher*, 95 U.S. 269, 24 L. ed. 410).

In Williston on Contracts (Rev. Ed.) sec. 623, p. 1792, the author says:

"The interpretation given by the parties them-



selves to the contract as shown by their acts will be adopted by the court, and to this end not only the acts but the declarations of the parties may be considered."

See also Page on Contracts (2d Ed.) Sec. 2034, p. 3510; 12 Am. Jur. Sec. 249, p. 787; and *City of Chicago v. Sheldon*, 76 U.S. 50, 19 L. ed. 594, where the court said that the practical construction by the parties of an ambiguous contract is entitled to great, if not controlling, influence.

At the time appellants were paid off by appellee, appellee rejected the applicability of the Board's decisions, took the same position in this cause by contending, in support of exceptions to the original libel, that appellants could base no rights upon the decisions of the Board, and finally stipulated that if appellants recovered, their recovery should be limited to the \$80.00 per month provided by supplementary agreement, not the \$100 per month fixed by Board decisions and awarded by the trial court. Upon this appeal appellee half heartedly advances the contrary view but in doing so obviously is inspired by the decision of the trial court and its independent construction was plainly indicated by words and conduct to be that the Board's decisions have no application.

### **Collective Bargaining Agreements Do Not Negative More Advantageous Provisions of Shipping Articles**

A discussion of this subject is invoked by appellee's reference to *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 88 L. ed. 762. While appellee's position on the point is not clearly made and it perhaps does not intend



to argue that the crew members can in no event have more than collective bargaining agreements accord them, such a position is at least intimated on pp. 67 and 68 of appellee's brief, and for that reason, we think the point merits discussion.

In the *J. I. Case Co.* decision, the Supreme Court held that an individual agreement, inconsistent with a collective bargaining agreement and amounting to an unfair labor practice, could not be made. The language of the opinion admits the possibility that an individual employee may be denied benefits under individual agreement greater than those accorded by the collective agreement. However, the court is careful to state that such a result is not necessarily the case. This phase of the court's opinion is discussed in an able annotation in 88 L. ed. 770 where the author says, at p. 787:

"Whether an individual employment contract is valid or invalid to the extent that it contains provisions more favorable to the employee remains an open question. See *J. E. Case Co. v. National Labor Relations Bd.* (reported herewith), where the court pointed out that it was not called upon to decide that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, and said: 'Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the law of contracts applicable, and to the Labor Board if they constitute unfair labor practices'." Aside from the above-quoted comment, it should be

remembered here that the rider in question is not merely an individual bargain but, as appellee itself states in its brief, (p. 64) was brought into existence by the unions, the collective bargaining agents. It was no less the result of collective bargaining than were the more general supplementary agreements. Thus, while the shipping articles, which include the rider, constitute a several contract with each seaman (*Oliver v. Alexander*, 6 Pet. 143, 8 L. ed. 459; *Peninsular & Occid. SS Co. v. N.L.R.B.*, 98 F.(2d) 411, Cert. Den., 305 U.S. 653, 83 L. ed. 423), they also evidence a collective bargain.

In addition to the foregoing, and whatever rule may be applicable to individual contracts in other employment relations where collective agreements also exist, it seems plain that in the light of 46 U.S.C.A. 564, no collective agreement may derogate from the rights of a seaman under shipping articles. Under 46 U.S.C.A. 564, the contract of employment of seamen must be in writing, as near as may be in the form prescribed by statute, must be signed by the master before any seaman signs the same and must provide, among other things, the amount of wages each is to receive. In short, seamen must serve under shipping articles which must stipulate the amount of their wages. In the light of this statute, the court, in the *Peninsula & Occid. Ss. Co.* case, *supra*, said:

“Not only would the company have the right to make individual contracts, evidenced by the shipping articles but was required by law to do so.”

We submit that a steamship operator may not in reliance upon a collective agreement not expressly incorporated in the shipping articles pay wages less than those stipulated in the articles.

Thus, we return ultimately to the meaning of the rider. If the rider meant, as we respectfully urge that it did mean, that the members of the crew were to receive bonus during imprisonment despite what collective agreements might provide, they are not to be deprived of this advantage no matter what interpretation may be placed upon the October agreements and the decisions of the Maritime War Emergency Board.

### CONCLUSION

The crew of the "CAPILLO" joined the vessel in reliance upon an express and unqualified stipulation that they would be paid war bonus for periods of imprisonment following loss or destruction of the vessel. They suffered under long periods of imprisonment by the Japanese under conditions that have been graphically described to us all. Money cannot compensate for the suffering they underwent but, in terms of money, it would require incomparably more to compensate them for their imprisonment than for shipboard life and duties. They, of course, counted upon the express stipulation in the rider, and during their long suffering in prison camps derived some distraction and solace from thought of their accumulating wages and bonus and from computing the amounts accruing to them. Now to tell them, as appellee has, that for elaborately involved reasons

they are not to be paid what in plain language was promised them, is, we respectfully submit, to do a very shocking thing. It is not merely that one's sympathies are naturally aroused by the plight of the surviving members of the crew and their families, but it instantly springs to mind that law justifying such a result is a shockingly poor kind of law. We believe the very fact that the crew members would naturally expect to be paid the bonus during their imprisonment, entitles them to such payment. Construction of contracts is not an artificial process but is merely the process of arriving at the meaning the parties must have assumed the contract to have. Anyone, including appellee, would certainly believe that the crew would expect bonus during imprisonment and that is the basic reason they are entitled to it.

Respectfully submitted,

JOHN GEISNESS,

BASSETT & GEISNESS,

*Amici Curiae.*





IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM  
A. PORTER and SAMUEL S. TAYLOR,

*Appellants,*

vs.

AMERICAN MAIL LINE LTD., a corporation,  
*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION.

---

PETITION FOR REHEARING

---

JOHN AMBLER,

GROSSCUP, AMBLER & STEPHAN,

*Proctors for Appellee.*

807 Central Building,  
Seattle 4, Washington.

FILED



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**IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

No. 11100

---

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM  
A. PORTER and SAMUEL S. TAYLOR  
*Appellants,*

vs.

AMERICAN AIR LINE LTD., a corporation  
*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION

---

**PETITION FOR REHEARING**

---

To the Honorable Judges of the United States Circuit  
Court of Appeals for the Ninth Circuit:

Comes now American Mail Line Ltd., appellee in the  
above entitled action, and respectfully petitions this  
court for a rehearing upon the grounds and for the  
reasons hereinafter set forth:

**PRELIMINARY**

This is an action by four members of the crew of the  
S. S. CAPILLO who were repatriated on the M. S.  
GRIPSHOLM to New York in December, 1943, for



war bonus during their internment ashore by the Japanese and for transportation from New York to the Pacific Coast under paragraph 2 of a Rider to the Shipping Articles of the vessel. The trial court denied recovery and this court has reversed the action of the trial court. (The Rider is reproduced verbatim in Appendix A.)

# I.

## NO ISSUE IS TAKEN IN THIS PETITION FOR RE-HEARING ON RULING OF THIS COURT THAT DECISIONS OF MARITIME WAR EMERGENCY BOARD DO NOT APPLY TO INSTANT CASE

We take no issue in this petition for rehearing with the ruling of this court that Decisions of the Maritime War Emergency Board are not controlling in this case. The trial court, upon appellee's exceptions to the original libel, which urged the applicability of such Decisions, struck all references thereto (Ap. 9, 15). Appellee has never urged the applicability of these Decisions (Ap. 81). The Decisions of the Maritime War Emergency Board were merely introduced to show that the Board "after careful" and "additional" consideration to "existing collective bargaining agreements" adopted the rule of the *then current* collective bargaining agreements on both coasts that *no war bonus* was payable during internment of a crew ashore (Ap. 280, 288; Brief of Appellee, pp. 53-55). This has been the rule throughout the war (Brief of Appellee, pp. 30-31).

## II.

**OCTOBER SUPPLEMENTARY AGREEMENTS DO NOT  
CONTEMPLATE PAYMENT OF WAR BONUS DURING  
INTERNMENT OF CREW ASHORE**

The court holds:

“ \* \* \* It requires no testimony to make it clear that the union agreements did not provide for the bonus during the period specifically provided in the shipping articles. \* \* \* ”

This statement means that the following language contained in both the October Supplementary Agreements of appellee with the Marine Firemen, dated October 9, 1941, and that with the Marine Cooks, dated October 10, 1941, does *not* require the payment of war bonus during internment of the crew ashore.

“In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the *basic* wages and *emergency* wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War *bonuses* at the rate specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the *war zones defined herein.*” (Ap. 123, 114. Emphasis ours)

A considerable portion of the brief of appellee on this appeal was devoted to showing that the above quoted language from the October Supplementary Agreements did not contemplate payment of bonus during internment of the crew ashore (Brief of Appellee, pp. 38-48, inc.).

The identical quoted language is also contained in the agreement between appellee and the Sailor's Union (Ap. 266. See Appendix B).

Almost identical language is contained in the agreements between appellee and the licensed officers and between appellee and the American Communications Association Radio Operators (Ap. 259, 265, 266. Appendix B).

(For the convenience of the court we are quoting in Appendix B the exact language of *all* October Supplementary Agreements on this subject.)

As the so-called October Supplementary Agreements between appellee and the six maritime unions contemplate that *no war bonus* is payable during internment of a crew member ashore, if these Supplementary Agreements supplant the language of the second paragraph of the Rider to the Shipping Articles of the S/S Capillo this court must revise its opinion and deny appellants' recovery.

### III.

#### QUESTIONS ON WHICH REHEARING IS SOUGHT

Appellee takes strenuous issue with two phases of the decision of this court. We believe that the following discussion will convince the court that its decision should be both *reconsidered and changed*.

#### Importance of Questions Involved

This case is important to the Shipping Industry—to employers and employees alike.

(1) It is believed that it is the *first* case to reach an Appellate Court on the construction of Riders to the Shipping Articles.

(2) We believe it is the *first* case to reach an Appellate Court on the question of payment of war bonus during internment of a crew ashore.

The solution of the case hinges on what the Unions and the appellee, *at the time* of its *adoption*, meant by a Rider to the Shipping Articles of the S. S. CAPILLO.\*

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\* The testimony is wholly uncontradicted and it is a matter of general knowledge that for years wages and working conditions have been negotiated on an industry wide basis between the employers and the unions, not on an individual vessel basis.

"Q. (By MR. AMBLER): Mr. Williams, referring to these contracts and the supplemental agreements which you have described and identified, were the crews of the various vessels of the American Mail Line which sailed out of the Columbia River governed by those contracts and supplemental agreements? A. They were. Q. And did you pay the crews in accordance with those? A. We did." (Ap. 134)

"Q. The American Mail Line in the fall of 1941 had all of its vessels covered by agreements with the six Maritime Unions which are here mentioned? A. That is correct. Q. And it had no contracts with any other Unions during that period? A. It did not. Q. And all of its employees, seagoing employees, were covered by agreements with these six unions, is that correct. A. That is correct." (Ap. 153)

"Q. (By MR. AMBLER): And all of your crews of all of your ships, during 1941 and before, did all of their collective bargaining through the Unions with the Association which represented your company? A. That is true. Q. And they were paid in accordance with these various agreements which were made between the unions, acting on behalf of the employees, and the Association, acting on behalf of the Employer, is that correct? \* \* \* A. That is correct." (Ap. 155)

"Q. (By MR. AMBLER:) Will you state whether or not all crews of all vessels of the American Mail Line, during the



The decision in this case will have a profound influence on the interpretation of Riders to Shipping Articles, which are so common at this time. This is a test case which will probably decide the rights of the entire crew of the S. S. CAPILLO (not merely the four here actually concerned) on the subject of war bonus during their internment ashore. This case will have a strong bearing on the question of payment of war bonus to crews of other vessels during their internment ashore.

We respectfully submit that the court has misconstrued the first paragraph of the Rider reading as follows:

“The American Mail Line agrees to *pay* an emergency *war bonus* to the crew of the S. S. *Capillo*, Voyage 6, in accordance with provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners’ Association and the various Marine Unions.” (Emphasis ours)

We respectfully submit that the court has wholly ignored paragraph 6 of the October Supplementary Agreements here involved reading as follows:

“The provisions of this agreement shall be *effective on all voyages* shipping articles for which were entered on or after August 16, 1941 or upon any voyage to which the provisions herein are made *applicable by special agreement or rider attached to shipping articles.*”

---

period of 1940 and 41, were governed by agreements and supplemental agreements entered into by the Pacific American Shipowners Association on behalf of the Employer, and the six Maritime Unions representing the seagoing personnel? A. They were.” (Ap. 156)

We respectfully submit the court has *wholly ignored* the last paragraph of the Rider reading as follows:

“It is further agreed that in the event of any increase in pay, overtime or war bonus or changes in insurance, which may be granted, as the result of negotiations between the Union and the Pacific American Shipowners’ Association, the company will be *governed* by the *terms* and *effective date* of any agreement so reached.” (Emphasis ours.)

#### IV.

#### ERRORS IN THE COURT’S DECISION

##### (a) OCTOBER SUPPLEMENTARY AGREEMENTS ARE “IN EFFECT” FROM THEIR EFFECTIVE DATE, NOT MERELY FROM THEIR DATE

The court holds that the Supplementary Agreements of appellee with Marine Firemen of October 9, 1941, and the Supplementary Agreement of appellee with the Marine Cooks dated October 10, 1941, became effective *as of their date*, not as of the date which the agreements provide as their *effective date*. The opening paragraph of the Rider is as follows:

“The American Mail Lines agrees to *pay* an emergency *war bonus* to the crew of the S. S. Capillo, Voyage 6, in accordance with *provisions* contained in the applicable supplementary agreements *in effect* between the Pacific American Shipowners’ Association and the various Marine Unions.” (Ap. 31. Emphasis ours)

The court holds that these two contracts were “in effect” on October 11, 1941, the date when the Shipping Articles on the S. S. CAPILLO were signed, because

these two contracts were dated prior to that date. The Court says "The words 'in effect' do not mean 'hereafter to be made'."

We respectfully submit that the *date* of the Supplementary Agreements, in this instant case, is *utterly immaterial*. Whether the particular Supplementary Agreement is "in effect" depends, on the other hand, upon when the Supplementary Agreement makes the same "effective," if it contains a specific provision on the subject. *Here it does*. The two Supplementary Agreements here involved each provide as follows:

6. "The *provisions* of this agreement shall be *effective* on all voyages shipping articles for which were entered into *on or after* August 16, 1941, or upon any voyage to which the provisions herein are made applicable by special agreement *or rider attached to shipping articles*." (See Appendix B.)

The first paragraph of the Rider thus incorporated the "provisions" of "applicable" Supplementary Agreements "in effect." The "applicable" Supplementary Agreements are, of course, those dealing with *war bonuses* and other war compensation. Whether they are "in effect" on this vessel depends on the language, if any, of such applicable Supplementary Agreements on the subject of their *effective date*. In the absence of specific language on the subject the dates of the contracts would probably govern. Here, however, *all* six Supplementary Agreements contained *explicit* language as to their effective date. The construction urged by appellee has been the *practical* construction placed on the language of the Rider and

the Shipping Agreement since August, 1941, when the Rider was first adopted.

It will be recalled that the S. S. CAPILLO was the fourth vessel on which the Rider was used. These four vessels were the M. S. CROWN CITY, Articles signed August 13, 1941; S. S. COLDBROOK, Articles signed August 27, 1941; S. S. SATARTIA, Articles signed August 30, 1941 (Ap. 107). It will be observed these Articles were dated about *two months before* the October Supplementary Agreements were dated and *yet* as the October Supplementary Agreements all provided for their *retroactive* application to August 16, 1941, the crews of these three ships and, of course, the crew of the S. S. CAPILLO were paid off in accordance with increased bonus rates of the October Supplementary Agreements.

Mr. Lintner, a witness in this case, testified as follows:

“My understanding was at the time that a rider was just a temporary understanding which was to be interpreted and determined by the results of negotiations which were under way at the time. It was not unusual for us to put on riders on articles to cover situations that were under discussion, and in *every case* it was the *practical* application that the results and the agreements reached in connection with those riders were what the rider meant.” (Ap. 98-99)

The writer of this brief has corroborated these payments to the crews of the four vessels.

We emphasize the foregoing as it illustrates the purpose of the Rider which the court's opinion vir-



tually nullified. The court's opinion requires the Supplementary Agreement to have been dated before the date of the Shipping Articles to make such agreement effective. *The actual value of this Rider is to make effective, contracts negotiated long after their date, if the particular Supplementary Agreement, as here, provides for a retroactive effective date.*

The problem is a practical one and we earnestly ask the court to consider it as such. The custom of attaching Riders to Shipping Articles has been common throughout the industry. The practical reason for the construction urged by the petitioner is urged below. It is not only the *practical*, but the *real* reason.

### **Practical Causes Necessitating Such Riders**

There were six Unions represented on board the S.S. CAPILLO on October 11, 1941. Negotiations between the employers and the Unions had been in almost constant progress. That is a situation which was true at the time and is often true. If a vessel remained in port until all negotiations with all six Unions had been completed and contracts signed, serious delays would obviously occur. The Unions, therefore, frequently resort to Riders like the one in question which assure the crew that they will receive the same benefits as if the ship had actually remained in port until all negotiations are completed.

While riders were not ordinarily *necessary* to make effective later agreements, here the Rider provided special compensation in the event a vessel was lost or seized through war risk. Such compensation had not

been covered before. The Rider was necessary here to insure such coverage if later Supplementary Agreements failed, as they had in the past, to do so. When the Supplementary Agreement carried full provisions for this subject they became effective.

The custom of incorporating by Rider the provisions of collective bargaining agreements *to be later made* is a relatively old one. *Jones v. United States* (D. C. Md. 1922) 284 Fed. 721; *The Howick Hall* (D. C. La. 1925) 10 F.(2d) 162. In each of these cases the Shipping Articles contained a clause purporting to make the wages set out in the Shipping Articles subject to *later change* in rates of pay. In both cases a reduction in the scale of wages shown on the Shipping Articles was subsequently made by the employer, the United States Shipping Board, by its *unilateral* action. It will be observed in the instant case that the first and last paragraphs of the Rider expressly require the *joint* action of the Unions representing the crew and Pacific American Shipowners' Association representing the employer. In respect to this last difference in the facts of the two cases cited and the instant case, the court in *The Howick Hall* case said:

“\* \* \* I have no doubt that, had the officers of the seamen's unions and the shipowners' association *reached an agreement*, both sides would have been bound by it, and the clause could have been given effect; but to allow the shipowner or the captain to arbitrarily reduce wages would be going too far, and to give the clause that meaning would render it void for lack of mutuality.” (p. 163)

The opening paragraph of the Rider must be read

in the light of reality, the practical end to be attained and the subsequent interpretation of the parties. When agreements are finally concluded between the employers and the Unions, such agreements usually contain, as they did here, an "effective date" which in the *instant case* was August 16, 1941.

**Present Decision of the Court Denies Members of Two Unions the Right To the Higher Bonus Rates of the October Supplementary Agreements.**

We might also point out at this time that while *four* of the Supplementary Agreements were *dated* prior to October 11, 1941 (Ap. 114, 119, 259, 266), *two* were dated October 15, 1941, and October 16, 1941 (Ap. 265, 266). If the present interpretation of the court is right that the *dates of the Supplementary Agreements* are their *effective dates*, then the last two Supplementary Agreements would not furnish even the bonus rate for *all* the crew of the S. S. CAPILLO. The licensed engineers and radio operator covered by these last two contracts would receive a *lower* bonus rate than their shipmates although (1) these two contracts of October 15, 1941, and October 16, 1941, like the four other October Supplementary Agreements, explicitly provide that their *effective* date is retroactively fixed at August 16, 1941, and (2) the licensed engineers and radio operators on the three earlier ships having the identical Rider, received the higher bonus rates of the October Supplementary Agreements.

**(b) ALL THE "PROVISIONS" OF THE OCTOBER SUPPLEMENTARY AGREEMENTS APPLY NOT MERELY TO THE BONUS RATE OF THE OCTOBER SUPPLEMENTARY AGREEMENTS.**

Not only the bonus rate and the "effective" date but *all* the "provisions" of the October Supplementary Agreements are made applicable by *both* the first paragraph of the Rider and the language of the October Supplementary Agreements themselves. If there had been *no* Rider all the "provisions" of the October Supplementary Agreements by their own provisions would have been *applicable* and *effective* as *all* such agreements are made by their terms retroactively effective to August 16, 1941. If the first paragraph of the Rider drawn by the Unions is not clear as to the applicability of *all* the provisions and terms of the October Supplementary Agreements, then the language of such Supplementary Agreements themselves made subsequent to the Rider by the same Unions supplies any clarification that is needed by saying:

"The *provisions* of this agreement shall be effective on *all voyages* \* \* \* after August 16, 1941 or upon any voyage to which the provisions herein are made *applicable by special* agreement or *rider* attached to shipping articles." (Emphasis ours)

This paragraph emphasizes that the Unions had in mind shipping articles such as those here involved which made "applicable" later supplementary agreements. To put it in reverse fashion, the October Supplementary Agreements expressly provided that their "provisions" were to be effective on the voyage here



under discussion. It could certainly not be argued that there is any language in the Rider making such "provisions" inapplicable. On the other hand, the first and last paragraphs of the Rider *reassert* or *reiterate* the applicability of the "provisions" and "terms" of the October Supplementary Agreements.

The decision of the court holds that the war bonus rate of \$80.00 per month provided in the October Supplementary Agreements dated October 9, 1941, and October 10, 1941, is the one applicable to appellants in the instant case, but declines to apply the accompanying "provisions" of the bonus rate. The court reasons that as the second paragraph of the Rider specifically provides for bonus to the crew during internment, it is controlling, because the October Supplementary Agreements do not specifically provide for payment of bonus to the crew while interned.

To hold as the court does that the accompanying "provisions" on war bonus in the October Supplementary Agreements are not "applicable" to this case because they contain *no* provision for payment of bonus during internment of the crew ashore is to ignore the fact that the Rider and the October Supplementary Agreements both have clauses which are clearly designed to cover the *complete field* of compensation to crews of vessels lost or interned through war risk. To illustrate the foregoing we place in parallel columns first the language of the Rider and then the language of the Supplementary Agreements:

## PROVISIONS OF RIDER TO SHIPPING ARTICLES

## CORRESPONDING PROVI- SIONS FROM OCTOBER SUPPLEMENTARY AGREEMENTS

"In the Event the Vessel and/or Crew Be Interned, Imprisoned, Hospitalized or Put Ashore Due to War Causes and for That Reason, Be Unable to Continue Their Voyage, the Company Agrees to Pay Wages and Bonus to the Date Members of the Crew Arrive in an United States Port, on the Pacific Coast: Furthermore the Company Agrees, in Such Event, to Arrange for Repatriation of Such Men to an United States Port, on the Pacific Coast. Also, That the Company Be Liable for Any Injuries Suffered by Any Crew Member Due to War Causes.

"The Company Agrees to Reimburse Each Man so Affected by the Amount of \$150.00 in the Event of Loss of Personal Effects by Any Member of the Crew Due to Necessity of Abandoning the Ship Resulting From Torpedoing, Mining, Bombing, Shelling, Scuttling or Any Other War Causes, Which Results in the Ship Wreck of the Vessel.

"The Company Also Agrees to Carry War Risk Insurance in the Amount of \$2,000.00 for each Member of the Crew, Against Loss of Life as a Result of War Perils." (Ap. 36)

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

"In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00.

"War risk Insurance in the sum of \$5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement." (Ap. 123-124)

We cannot believe that this court realizes the result which will flow from the rule which the court has just laid down. Stating it bluntly, it means that a party to a collective bargaining agreement may claim the benefits of the agreement—the result of the *give and take* attendant upon collective bargaining—*without* at the same time being bound by the limitations placed thereon. This is a shocking result and cannot have been intended by the court. Bonus during internment ashore was *traded* in collective bargaining for higher bonus rates and wider bonus areas. The increased war bonus rate of \$80.00 per month of the October Supplementary Agreements and the increased areas in which same is to be paid is inextricably tied in with the other provisions and terms which together make up the final negotiated agreement. The “provisions” quoted above state in detail when this *new* \$80.00 bonus rate is to be paid in case of loss or seizure of the vessel due to war risk. These provisions form a part of the new \$80.00 bonus rate. For the court to seize the \$80.00 rate and wider bonus area of the October Supplementary Agreements and to ignore the other accompanying “provisions” is to refuse to follow the exact language of the Rider and paragraph 6 of the October Supplementary Agreements and to ignore the history of how this rate of bonus was adopted.

### **Rate of War Bonus and Limitations Thereon Are Parts of the Same Agreement**

The record in the instant case shows that prior to August 16, 1941, Supplementary Agreements on the Pacific Coast contained *no reference to payment of war*



*bonus* to a crew after the loss or destruction of the vessel from war risk. (Ap. 132, 146-149). Under these circumstances upon the loss or internment of a vessel due to war risk all obligations of the owner to the crew summarily ceased. (Brief of Appellee, page 6).

In the conference called in New York, July-August, 1941, by the United States Maritime Commission and the United States Department of Labor to settle war risk compensation on a "national uniform" basis (Brief of Appellee, page 13), the Unions demanded increased rates of bonus, increased bonus areas, increased war risk insurance, and *further* demanded in the event of *loss or seizure* of the vessel through war risk, payment of wages, emergency increases, and *war bonus* until repatriation to the United States (during internment), compensation for lost effects and transportation to "port of signing on" (Ap. 209-211). Counterproposals were made by the operator offering substantial reductions in these demands. (Ap. 242-244). As a result of these negotiations a compromise was reached on August 16, 1941, in which substantial increases in rates of bonus, areas of bonus and war risk insurance were agreed upon and, *in addition*, for the *first* time, substantial compensation *after the loss or seizure of a vessel due to war risk* (but no bonus during internment). (Ap. 213-218). This agreement of August 16, 1941, was limited to licensed officers.

The following report on the contract of August 16, 1941, was distributed within a week after the making



of this contract and illustrates the final result of the negotiations:

“The new agreement which will apply *uniformly* on all Coasts, provides for a bonus of 60% of basic wages in lieu of the present 50% ; extends the war bonus area in the Pacific Ocean to the 180th Meridian instead of the 160th Meridian of East Longitude which formed the previous boundary, Voyages to Iceland or Greenland will be compensated for by a 60% bonus. Loss of personal belongings due to sinking of vessel, etc., will be compensated for up to \$500. The new agreement provides for continuance of basic wages and temporary emergency wages in case of internment, until arrival back in the *United States, but payment of bonus does not continue under such circumstances.*” (Ap. 223-226, Emphasis ours.)

Many demands of the Unions were met during the negotiations, but the demand for payment of *bonus during internment ashore and repatriation to “port of signing on”* were *not granted*. It was a *good trade* from the standpoint of the Unions. In the summer and fall of 1941 the war seemed remote and capture and internment of crews even more so. *Every seagoing member* of the Unions would benefit by higher bonus rates and more extended bonus areas. Loss of bonus during internment even in the unlikely event of capture and internment could only affect a small percentage of the membership of the Unions.

Subsequent negotiations on the Atlantic Coast with unlicensed personnel produced the same result (Ap. 231-236).

Subsequent negotiations on the Pacific Coast pro-

duced the same result for licensed and unlicensed personnel. (Brief of Appellee, pp. 22-25)

The same rule that bonus was not payable to a crew while interned ashore was followed after the war started by the Maritime War Emergency Board. (Brief of Appellee, pp. 30-31)

These facts leading up to the adoption of the Rider and the October Supplementary Agreements must be considered by the court as they formed the basis of the entire arrangement which the court is in this case called upon to interpret.

When the Rider was first presented in early August, 1941, by the Unions and first used by American Mail Line Ltd. on the articles of a vessel dated August 13, 1941, the Supplementary Agreements up to that time were entirely silent on the payment of war bonus *after* loss or capture of the vessel through war risk. The Rider therefore made elaborate provisions for same to protect the crew as the situation then existed. When new Supplementary Agreements were made, the first paragraph of the Rider contemplated that their "provisions" would be controlling where they were at variance with the Rider. The negotiations between the Unions and the operators have been emphasized to illustrate that the bonus rate and bonus area cannot be disassociated from the "provisions and terms" as to when such bonus rate should be paid. The rate and area were the result of long negotiations in which concessions were made on both sides.

We review the foregoing to show that bonus rate and bonus area cannot be disassociated from the accompanying "provisions" as to when it is to be paid.

### (c) COURT HAS IGNORED LAST PARAGRAPH OF RIDER

The last paragraph of the Rider reads as follows:

“It is further agreed that in the event of any increase in pay, overtime or war bonus, or changes in insurance, which may be granted, as the result of negotiations between the Union and the Pacific American Shipowners’ Association, the company will be governed by the *terms* and *effective date* of any agreement so reached.” (Emphasis ours)

If the court should determine, in the face of what we believe to be the overwhelming evidence to the contrary, that the first paragraph of the Rider did not make all the October Agreements controlling from August 16, 1941—their “*effective date*”—then the last paragraph of the Rider *certainly* does so.

The last paragraph of the Rider provides that in *future* agreements, if there is an “increase in pay, overtime or war bonus”, its “*terms*” and “*effective date*” apply. Here there was a substantial increase in both the *rate* of bonus and also the *area* in which it was to be paid. The crews of the three earlier vessels received this higher bonus in the wider area as provided in the October Supplementary Agreements by virtue of the identical Rider here involved and the terms of the identical October Supplementary Agreements here involved.

In this case the employer for the *first time* has invoked the accompanying “*terms*” of the October Supplementary Agreements as to when the increased bonus provided in these agreements should be paid. As sug-

gested above the court has construed the Rider as a “*one way street*”. According to the ruling of the court only “provisions” and “terms” favorable to the crew are to be applied. “Provisions” and “terms” accompanying the higher bonus rate of the October Supplementary Agreements are to be *ignored* if they are unfavorable to the crew. This is manifestly neither fair, nor does it encourage confidence in collective bargaining agreements.

The October Supplementary Agreements provided a substantial *increase* in “pay, overtime or war bonus.”

“1. The rate of bonus was increased from \$60.00 a month to \$80.00 a month, for unlicensed personnel, such as appellants, earning under \$120.00 a month (133, 116).

“2. For licensed officers and unlicensed personnel earning over \$120.00 a month bonus was raised from 50% of basic wages to 66 2/3% of basic wages (132, 116, 261, 265).

“3. The area in which bonus was payable in all cases was increased *from* the crossing of the 160th Meridian westbound to recrossing the same Meridian eastbound *to* the period from crossing the 180th Meridian westbound to recrossing the 180th Meridian eastbound (132, 116, 261).

“4. Port bonus was provided in the case of unlicensed personnel for ports subject to regular bombing (114, 117, 266).

“5. Payment for lost effects of unlicensed personnel was provided at \$150.00 and for licensed personnel at \$500.00 for the first time in the October Supplementary Agreements (114, 117, 259, 265, 266).



“6. War risk insurance increased for all persons from \$2,000.00 to \$5,000.00 (114, 117, 259, 265, 266).”

“It will be also recalled that basic wages for the appellants had been raised \$10.00 a month by contracts negotiated in the late fall of 1941, and appellants were paid off at these new basic rates rather than those shown in the Articles (135, 269).” (Brief of Appellee,, pp. 34-35)

The first and last paragraphs of the Rider unequivocally emphasize the primary purpose thereof, which was to keep the rights of the crew of the S S. CAPILLO in line with current developments in collective bargaining.

**Rider is unequivocal that “provisions” and “terms” of supplementary agreements shall apply—No saving of more favorable *existing* rights.**

It has been suggested that the Unions drafting and presenting the Rider could not have intended to disturb by their Supplementary Agreements advantages or rights already protected by favorable explicit language in the Rider, i.e., such as the language on *bonus* during internment ashore. The answer is *evident* and *conclusive*.

When rights under existing contracts were to be preserved there has never been any difficulty in so doing and it is often done. In the instant case, for example, Decision of the National Defense Mediation Board, in case No. 80, provides in part as follows:

“Nothing in these recommendations shall be interpreted so as to reduce benefits now existing under collective bargaining contracts. Except as here-

in modified, existing contracts and arrangements shall continue.” (Ap. 231)

And again, in the Statement of Principles, adopted December 17-19, 1941, it was provided:

“\* \* \* It is understood and agreed that \* \* \* of all agreements and obligations arising as a result of collective bargaining agreements will in no way be violated. \* \* \* ” (Ap. 200)

It is a common practice in collective bargaining agreements to provide that a contract upon becoming effective should not lessen or diminish pre-existing rights. Such, however, was *not done* in the *instant* case. The exact *opposite* was done. Paragraph 6 of the October Supplementary Agreements unequivocally provided, “The provisions of this agreement shall be effective \* \* \* .” There can be no question of the authority of the union to modify the Rider because the Rider by its own terms provides that war bonus is to be paid “in accordance with provisions contained in the applicable Supplementary Agreements in effect \* \* \* .”

### AMERICAN MAIL LINE LTD. NOT OWNER OF THE S.S. “CAPILLO”

While it has no bearing on the issues of the instant case we would like to call attention to the fact that the American Mail Line Ltd. was not the owner of the CAPILLO as stated in the opening paragraph of the court’s opinion. The owner of the vessel at all times has been the United States of America. The American Mail Line Ltd. was operating the vessel under bareboat charter.

## CONCLUSION

We respectively submit:

1. The first paragraph of the Rider incorporates the "provisions" of the Supplementary Agreements whose effective date is prior to October 11, 1941. The mere *date* of the Supplementary Agreements is immaterial where an *effective* date is specifically given.

2. The first paragraph of the Rider and paragraph 6 of the October Supplementary Agreements plainly show that *all* of the provisions of the latter are *applicable*.

3. The October Supplementary Agreements were the result of *long negotiations* and their bonus rates are inextricably tied into the accompanying "provisions" of the October Supplementary Agreements as to *when* such bonus is to be paid. The rate of bonus, and the accompanying provisions as to when it is to be paid, form a full, integrated and uniform arrangement.

4. The language of the second, third and fourth paragraphs of the Rider are superseded by the corresponding provisions of the October Supplementary Agreements on the same subject which, on their face and by the history of negotiations, are a full, integrated and uniform arrangement covering *all* phases of the subject.

5. If the "provisions" of all October Supplementary Agreements are not incorporated by the *first* paragraph of the Rider, then their "terms and effective date" are incorporated by the *last* paragraph of the Rider as they *all* provide for substantial increases in "pay, overtime or war bonus".

We respectfully petition the court to reconsider and correct the errors in its opinion discussed above.

AMERICAN MAIL LINE LTD., Petitioner

By A. R. LINTNER, President

GROSSCUP, AMBLER & STEPHAN

JOHN AMBLER

*Proctors for Petitioner*

STATE OF WASHINGTON, County of King, ss.

A. R. LINTNER, being first duly sworn, on oath, deposes and says that he is President of AMERICAN MAIL LINE LTD., a corporation, the petitioner named in the foregoing Petition for Rehearing; that he executes this verification as the act and deed of said corporation for the uses and purposes therein stated, being duly authorized so to do; that he has read said Petition, knows the contents thereof and the same are true as he verily believes.

A. R. LINTNER

Subscribed and sworn to before me this 15th day of April, 1946.

INEZ M. ANNESLEY

Notary Public in and for the State  
of Washington, residing at Seattle.

### **CERTIFICATE OF COUNSEL**

As counsel for AMERICAN MAIL LINE LTD., petitioner in the above Petition for Rehearing, I hereby certify that in my judgment the petition is well founded and that it is not interposed for delay.

JOHN AMBLER





## **APPENDIX A**

### **RIDER TO ARTICLES**

The American Mail Line agrees to pay an emergency war bonus to the crew of the S.S. CAPILLO, voyage 6, in accordance with provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various marine unions.

In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and bonus to the date members of the crew arrive in an United States port, on the Pacific Coast: furthermore, the company agrees, in such event, to arrange for repatriation of such men to an United States port, on the Pacific Coast. Also, that the company be liable for any injuries suffered by any crew member due to war causes.

The company agrees to reimburse each man so affected by the amount of \$150.00 in the event of loss of personal effects by any member of the crew due to necessity of abandoning the ship resulting from torpedoing, mining, bombing, shelling, scuttling or any other war causes, which results in the ship wreck of the vessel.

The company also agrees to carry war risk insurance in the amount of \$2,000.00 for each member of the crew, against loss of life as a result of war perils.

It is further agreed that in the event of any increase in pay, overtime or war bonus, or changes in

insurance, which may be granted, as the result of negotiations between the union and the Pacific American Shipowners' Association, the company will be governed by the terms and effective date of any agreement so reached.

GALE T. BLUNDELL

Deputy U. S. Shipping Commissioner

K. O. DREYER

Master

## APPENDIX B.

### UNLICENSED PERSONNEL

Supplementary Agreement of October 10, 1941 between Marine Cooks and Stewards' Association of the Pacific Coast and Pacific American Shipowners Association provides in part as follows:

"4. War Risk Insurance in the sum of \$5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement.

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

"In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00.

\* \* \* \* \*

"6. The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941 or upon any voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles." (App. 119, 123, 124)



The identical language is contained in supplementary agreement dated October 9, 1941 between Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association and Pacific American Shipowners Association (Ap. 114) and in the supplementary agreement dated October 9, 1941 between the Sailors' Union of the Pacific and Pacific American Shipowners Association. (App. 266)

### **LICENSED PERSONNEL AND STAFF OFFICERS**

The supplementary agreement of October 10, 1941 between National Organization of Masters, Mates and Pilots of America and Pacific American Shipowners Association provides in part as follows:

“(3) In the event of loss of personal effects by any licensed officer, due to the necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, each licensed officer so affected shall be reimbursed by a sum not to exceed \$500;

“(4) In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date that members of the crew arrive in Continental United States ports and the employees shall be repatriated to a Continental United States port.

“While employees are in the war zone areas described herein war bonuses shall also be paid to them at the rate of 66 2/3% of the said basic wages in Areas I to V inclusive, and 25% in Area VI.

“(5) War risk insurance of \$5,000 shall be furnished each Licensed Officer on voyages described in the above danger areas; such policy shall provide for the payment of the said sum of \$5,000 to the estate or designated beneficiary of such Licensed Officer in case of death due to war conditions or the payment of said sum to the Licensed Officer himself in the event of his total and permanent disability due to such war conditions, and shall provide for payment of any sum less than \$5,000 to which such Licensed Officer may be entitled for injury less than total or permanent disability resulting from said war conditions. Such policies shall be made available for inspection at the offices of the respective companies.” (Ap. 263-265)

The identical language is contained in the supplementary agreements between the Marine Engineers' Beneficial Association and the American Communications Association and Pacific American Shipowners Association (Ap. 265, 266).

The language of the court's opinion in the instant case suggests that the supplementary agreements of October 9, 1941, between appellee and the Marine Firemen and the supplementary agreement of October 10, 1941, between appellee and the Marine Cooks are not identical in respect to the language first above quoted.

In preparing the Apostles on Appeal at the request of the Proctor for appellants, to shorten the record only two supplementary agreements were printed in full, to-wit,

Supplementary Agreement of October 10, 1941, between appellee and Marine Cooks (Exhibit A-4, Ap. 119); and

Supplementary Agreement of October 10, 1941, between appellee and Masters, Mates and Pilots (Exhibit A-4, Ap. 259).

In the case of the two agreements of October 9, 1941, (Exhibit A-4, A-8, Ap. 114, 266), between appellee and the Marine Firemen and the Sailors' Union only that part of the agreement which differed from the agreement with the Marine Cooks (Exhibit A-4, Ap. 119) was printed.

So also in the case of the licensed officers and staff officers, only that part of the supplementary agreements of October 15, 1941, and October 16, 1941, between the appellee and the Marine Engineers and between the appellee and the American Communications (radio operator) was printed which differed from the supplementary agreement with the Masters, Mates and Pilots (Exhibit A-6, Ap. 265; Exhibit A-7, Ap. 266).

The identical portion of these latter four supplementary agreements was not reproduced.

A statement to this effect is contained in the stipulation concerning the exhibits following the provisions for omitting certain portions of the various exhibits. The language of the stipulation is as follows:

“The omitted portions being a duplication of the corresponding portions of the contracts covering unlicensed and licensed personnel, respectively.”

(Ap. 73- 74.)

Brief of appellee, on pages 52 and 53, corrects a confusion created by statements contained in appellants' brief to the effect that the provisions of the October

Supplementary Agreements covering Marine Cooks, Marine Firemen and Sailors were not identical.

Counsel for appellant upon having the error in his brief called to his attention under date of October 20, 1945, immediately wrote to the Clerk of this court corroborating the statement above made that the supplementary agreements with the Marine Cooks and Marine Firemen were identical (Exhibits A-3 and A-4) in containing the language quoted above.















**No. 11,101**

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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MILWAUKEE MECHANICS' INSURANCE  
COMPANY (a corporation),

*Appellant,*

VS.

SILVO QUESTA and JENNIE QUESTA  
(husband and wife),

*Appellees.*

**BRIEF FOR APPELLEES.**

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**WILLIAM S. BOYLE,**

204 Gazette Building, Reno, Nevada,

*Attorney for Appellees.*

**FILED**

**DEC 10 1915**

**HALL P. O'BRIEN**

**CLERK**



No. 11,101

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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MILWAUKEE MECHANICS' INSURANCE  
COMPANY (a corporation),  
vs.  
*Appellant,*

SILVO QUESTA and JENNIE QUESTA  
(husband and wife),  
*Appellees.*

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**BRIEF FOR APPELLEES.**

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Starting with page 2, captioned Statement of the Case: The statement of the case by appellees may be found in amended complaint (R. 3, 4, 5). The answer to amended complaint may be read (R. 8, 9, 10, 11). Page 3 sets forth matter concerning first trial wherein the judgment was reversed, 137 F. (2d) 943. The second trial was had, and a different judge was requested by appellants, and it was heard before Judge Louis E. Goodman, of San Francisco, California, who entered judgment for \$4200.00 for appellees.

On page 4 of appellant's brief is set forth specifications of errors, and on page 5 is set forth summary of argument.



The foregoing may be summed up with a statement that the appellant's only objection is the manner in which Judge Goodman wrote his order for judgment (R. 14, 15). If the judge had eliminated the lines "subject to modification of said amount if defendant subsequently appraised the property at a lower figure. Not having made such appraisement, defendant was bound, as if it had issued the policy, to pay the actual loss, not exceeding \$7500.00." Apparently appellant would have to seek and rely upon other specifications of errors.

On page 6 of appellant's brief, the appellant adds the following: "an extraordinary and unusual transaction". Further appellant argues: "Matters of common knowledge appertaining to insurance will be judicially noticed". The barn was in Nevada, and half of the insurance business is carried on in the street or by telephone. A call to an insurance agent telling him you desire your car insured, or your home, or barn insured, or a stock of Chinese herbs insured, they will be insured, and after appraisement the insurance will be raised or lowered. Matter of common knowledge engrosses the fact that insurance companies maintain engineers to appraise buildings, and invariably they will inform you that you do not carry enough insurance, or that you carry too much insurance.

Paragraph IV of amended complaint (R. 3, 4) sets forth that appellees applied to Frank Hassett, Esq., agent for appellees, for insurance in the sum of \$7500.00, and the agent agreed to insure the barn for that sum, and to deliver its policy of insurance in the

sum of \$7500.00. The Court found that to be true and fully supported by the evidence (R. 15, 16, 17, 18, 19). Many witnesses were called by both parties as to the damage suffered by the appellees, and the Court found the damage to be \$4200.00.

On page 7 of appellant's brief and argument, the appellant sets forth that: "But where plaintiff seeks to recover upon a special contract he cannot depart therefrom in his evidence". Appellees did not depart therefrom. The judge in his order for judgment could have ordered his secretary to write in all of the terms of the policies for insurance used in such cases, and as much other superfluous matter as he desired. It would not be inconsistent with an insurance order or contract for insurance, and consequently would not vitiate the contract.

The appellant unrelentingly relies upon the testimony of its witnesses, and disregards the testimony of witnesses for defendants. The Court had to determine his findings from that testimony and did so and found for plaintiffs for \$4200.00. Witnesses for appellant, Corica and Parrish, testified that they went to the ranch on September 9th and that Questa told them he had no insurance on the barn. Questa and his wife, and a Mrs. Parrish, testified that Parrish and Corica came in July. Mrs. Cupit bought 60 tons of hay, more or less, on July 3, 1941 (R. 218, 219). Mrs. Dorothy Parrish (R. 257) testified that Parrish and Corica were there in the middle of July, 1941. During the first trial the evidence of Parrish and Corica, and the cover note dated September 9th, were considered of

utmost importance. Mrs. Perri, who was then Mrs. Cupit, was brought to the courtroom by appellees to clear up the situation. She was called by appellant as a witness first, and her evidence shows that she bought the hay on July 3, 1941. Mrs. Cupit testified (R. 240): "A. I might have. I am usually very prompt about my insurance but I never thought of insuring hay and I never have since that time."

R. 215 shows insurance in the sum of \$1000.00 placed on hay by them on date of September 9, 1941, when Corica and Parrish testified they were at the ranch. The testimony shows there were ten (10) tons of hay on that date left at the ranch at \$15.00 a ton. Why should Mrs. Perri place \$1000.00 of insurance on \$150.00 worth of hay on September 9th? Is it not most likely that the insurance was placed on July 3rd when she had over \$1000.00 worth of hay at the ranch?

The district judge had to decide the correctness of the insistent claims of their star witnesses, Corica and Parrish, that on September 9th Questa had told them there was no insurance on the barn. It is obvious that the Court believed Questas, and Mrs. Parrish and Mrs. Cupit. Appellees refer to the entire transcript of record and ask that it be read fully. Mr. Hassett testified for appellant (R. 162): "Q. Would it be correct to say that where more than a few days is to elapse, or does elapse, between receiving a firm order for insurance and the issuance of the policy, that it is customary for you to issue a cover note? A. Not customary."

**AUTHORITIES.**

Cited in 92 *A. L. R.* 235:

“In some instances, however, it is not essential to an oral contract of insurance that every detail should be expressly agreed upon, since an implied agreement concerning essentials is as good as an expressed agreement. *Globe and R. F. Ins. Co. v. Draper*, 66 F. (2d) 985.”

Cited in 92 *A. L. R.* 237:

“Evidence showing that the insurer’s agent assured an applicant for automobile collision insurance that his automobile was ‘fully’ covered renders the amount of the insurance sufficiently definite for the purposes of an oral contract, since it is reasonable to imply that the company thereby bound itself *at least in a reasonable amount*. *Southern Casualty Co. v. Flowers*, 23 S. W. (2d) 507, 38 S. W. (2d) 570.”

For the reasons, and upon the grounds above stated, the judgment appealed from should be affirmed.

Dated, Reno, Nevada,  
December 10, 1945.

WILLIAM S. BOYLE,  
*Attorney for Appellees.*





No. 11102

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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BEN LIEBMAN, also known as B. LIEBMAN,  
MASSACHUSETTS BONDING AND IN-  
SURANCE COMPANY, a Corporation,  
Appellants,  
vs.

UNITED STATES OF AMERICA for the use  
and benefit of CALIFORNIA ELECTRIC  
SUPPLY COMPANY, a Corporation,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

FILED

OCT 3 - 1945

PAUL P. O'BRIEN,  
CLERK



No. 11102

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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BEN LIEBMAN, also known as B. LIEBMAN,  
MASSACHUSETTS BONDING AND IN-  
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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,

Attorney for Defendants and Appellants.

EDWARD T. MANCUSO, Esq.,

702 Central Tower,  
San Francisco, California,

Attorney for Plaintiff and Appellee.



In the Southern Division of the United States  
District Court, Northern District of California

No. 23289S

UNITED STATES OF AMERICA for the use  
and benefit of CALIFORNIA ELECTRIC  
SUPPLY COMPANY, a corporation,  
Plaintiff,

vs.

BEN LIEBMAN, also known as B. Liebman,  
MASSACHUSETTS BONDING AND IN-  
SURANCE CO., a corporation, First Doe, Sec-  
ond Doe, Black and White Corporation,  
Defendants.

Plaintiff complains of the defendants, Ben Liebman, also known as B. Liebman, Massachusetts Bonding and Insurance Co., a corporation, First Doe, Second Doe and Black and White Corporation, and for cause of action alleges:

I.

That the names of the defendants, First Doe, Second Doe, Black and White Corporation, are fictitious; that the true names of said defendants are unknown to plaintiff; that plaintiff is informed and believes and therefore alleges that said fictitious parties claim some interest in and to the demands herein; that plaintiff prays that when said names are ascertained, this complaint be amended and

that said true names be inserted, and that their rights be adjudicated herein; [1\*]

## II.

That the California Electric Supply Company is, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California, and licensed to do business in the State of California.

## III.

That the Massachusetts Bonding and Insurance Company is, and was at all times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, with its principal place of business in Boston, Massachusetts; that said corporation is licensed to do business in the State of California; that at all times herein mentioned said corporation was engaged, and by law was authorized to engage in, the business of a corporation surety on bonds required by law or contract within the State of California by license of said state, and had designated a person residing and who now resides in the City and County of San Francisco, State of California, upon whom process in civil actions against said corporation may be served.

## IV.

That heretofore on or about the 4th day of February, 1943, at the County of Alameda, State of California, the defendant, Ben Liebman, also known

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

as B. Liebman, entered into and executed a formal contract, said contract known and designated as "W868-eng-3690," with the United States of America for the erection of a public building known as a certain additional housing project in the County of Alameda, State of California; that in accordance with the laws of the United States, and the terms of said contract provided said Ben Liebman as principal, and defendant, Massachusetts Bonding and Insurance Company as surety, executed and delivered simultaneously with [2] the execution of said contract, their penal bond known and designated as "#48628-B, Liebman to U.S.A. on Contract #W868-eng-3690." Conditioned that said Ben Liebman should promptly make full payment to all persons supplying materials in the prosecution of said building project; a copy of said bond, marked "Exhibit A" is hereto annexed and made a part of this complaint.

#### V.

That thereafter the said Ben Liebman entered upon and on May 17, 1943 completed the said public work so required by said contract as aforesaid; that during the months of February, March and April, 1943 at the special instance and request of the Aetna Electric Company, a corporation, a subcontractor of Ben Liebman, also known as B. Liebman, the general contractor, and with said Ben Liebman's consent and approval, the California Electric Supply Company supplied certain electrical fixtures and materials, which said electrical fixtures and materials were installed in and at-

tached to said additional housing project pursuant to the terms and conditions of said government contract.

## VI.

That said additional housing project as in said contract provided was and is public work of the United States; that on or about the 24th day of May, 1943, plaintiff, California Electric Supply Company caused to be served, as provided by Title 40, Section 270 B.U.S.C. 1940 Ed. of the laws of the United States of America, on the Department of U. S. Engineers, San Francisco Office, Construction Division, War Department, U. S. Army, a Notice to Withhold Payment and Verified Claim in the amount of \$1,438.52, and simultaneously therewith served a notice to Withhold Payment and Verified Claim in like amount on Ben Liebman, also known as B. Liebman; that both of these notices [3] and claims were verified by plaintiff, California Electric Supply Company; that at the time of said service there was in the hands of said U. S. Engineers and due and payable under the terms of aforesaid contract a sum of money in excess of the claim of California Electric Supply Company; that thereafter the sum of \$1,438.52, amount of plaintiff's claim, was turned over to B. Liebman for the use and benefit of plaintiff herein; that subsequently, contrary to express directions and instructions, and contrary to plaintiff's rights, said defendant, Ben Liebman failed and refused and still does fail and refuse to pay said sum, or any part thereof, to the



California Electric Supply Company, plaintiff herein.

## VII.

That the fair and reasonable value of the electrical fixtures and materials furnished and installed in said project is the sum of \$1,438.52; that none of said sum has been paid and that the whole thereof is now due, owing and unpaid from defendants to plaintiff.

Wherefore: Plaintiff demands judgment for the use and benefit of said California Electric Supply Company against said defendant, Ben Liebman, also known as B. Liebman, and Massachusetts Bonding and Insurance Company, jointly and severally, for the aggregate sum of \$1,438.52 together with interest thereon at the rate of seven per cent (7%) and for the costs of suit incurred herein, and for such other and further relief as may be proper in the premises.

(Signed) EDWARD T. MANCUSO

Attorney for Plaintiff [4]

State of California,

City and County of San Francisco—ss.

L. B. McDonnell being first duly sworn, deposes and says:

That he is an officer of the California Electric Supply Company, a corporation, to-wit, the President thereof, and as such officer, he is hereby authorized to make this verification for and on behalf of said corporation.

That he has read the foregoing Complaint and

knows the contents thereof; that the same is true to his own knowledge except as to those matters stated therein upon information and belief, and as to those matters, he believes it to be true.

(Signed) L. B. McDONNELL

Subscribed and sworn to before me this 10th day of May, 1944.

[Seal] E. J. CASEY

Notary Public in and for the City and County of San Francisco, State of California. [5]

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## PAYMENT BOND

(Construction)

Pursuant to the Act of Congress, approved Aug. 24, 1935 (49 Stat. 793; 40 U. S. Code 270a.)

Bond No. C-48628

Know All Men by These Presents, That we, B. Liebman, an individual of 3319 Fillmore Street, San Francisco, California, as Principal, and Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in the said Commonwealth, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of Thirty-Five Thousand Two Hundred Thirty-Seven and No/100 Dollars, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and suc-

cessors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated February 4, 1943, for Construction of Additional Housing, Oakland Municipal Airport, Alameda, California (Contract No. W-868-eng-3690).

Now, Therefore, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 11th day of February, 1943, the name and corporate seal of each [6] corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal]      /s/ B. LIEBMAN

3319 Fillmore St.,  
San Francisco

In the presence of:

/s/ LOUISE RATTO

2645 Scott Street

/s/ E. D. PANGBURN

2222 North Point,  
San Francisco

Attest:

[Seal]

MASSACHUSETTS BONDING  
AND INSURANCE COMPANY

(Corporate Surety)

440 Montgomery Street,

San Francisco

By /s/ HENRY G. SHEEHY

Attorney-in-fact

/s/ P. DENAULT

The rate of premium on this bond is \$4.50 per thousand.

Total amount of premium charged, \$17.14.

[Endorsed]: Filed May 10, 1944. [7]

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[Title of District Court and Cause.]

ANSWER

Come now the defendants above named Ben Liebman, also known as B. Liebman, and Massachusetts Bonding and Insurance Co., a corporation, and answering the complaint of plaintiff on file herein admit, deny and allege as follows:

I.

Admit the allegations of paragraphs II, III and IV.

II.

Answering the allegations of paragraph V of said complaint said answering defendants admit that thereafter the said Ben Liebman entered upon and



on May 17, 1943, completed the [8] said public work so required by said contract, as aforesaid;

Said answering defendants have not sufficient information or belief to enable them to answer the allegations of said paragraph V wherein it is stated that during the months of February, March and April, 1943, at the special instance and request of the Aetna Electric Company, a corporation, a subcontractor of Ben Liebman, also known as B. Liebman, a general contractor, the California Electric Supply Company supplied certain electrical fixtures and materials, which said electrical fixtures and materials were installed in and attached to said additional housing project pursuant to the terms and conditions of said government contract and basing their denial upon said lack of information and belief said answering defendants deny generally and specifically, each and every, all and singular, said allegations;

Further answering the allegations of said paragraph V, said answering defendants deny generally and specifically, each and every, all and singular, the allegations of said paragraph wherein it is alleged that said California Electric Company supplied certain electrical fixtures and materials which were installed in and attached to said housing project pursuant to the terms and conditions of said government contract with the consent and approval of the answering defendant herein, Ben Liebman.

### III.

Answering the allegations of paragraph VI of said complaint said answering defendant admit the

allegations of said complaint commencing at line 22 thereof and ending with the words "Supply Company," line 2, page 4 of said complaint;

Said answering defendants deny generally and specifically, each and every, all and singular, the remaining portions of said paragraph commencing with the words "That at the time" at page 2, line 4 thereof, save and except that said [9] answering defendants admit that the said Ben Liebman has failed and refused and still does fail and refuse to pay said sum of \$1438.52, or any part thereof, to the California Electric Supply Company, the plaintiff herein.

#### IV.

Said answering defendants deny generally and specifically, each and every, all and singular, the allegations of paragraph VII of said complaint.

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And Now by Way of a Further and Separate and Distinct and Second Answer and defense to the complaint of plaintiff, said answering defendants allege:

#### I.

That on or about the 10th day of December, 1943, the above named California Electric Supply Company, a corporation, suggested to and requested of defendant Ben Liebman that the unpaid indebtedness of said last named defendant to the Aetna Electric Company, a corporation, the bankrupt in those certain proceedings entitled, "In the Southern Division of the United States District Court,

for the Northern District of California, In the Matter of Aetna Electric Co., a corporation, Bankrupt, No. 35800-R in Bankruptcy," to-wit, the sum of \$3230.67, be paid by said Ben Liebman to John O. England, the trustee in bankruptcy and that out of said last mentioned sum there be earmarked and set aside the sum of \$1438.52 until the final determination of the claim filed in said bankruptcy proceeding by said California Electric Supply Company, a corporation; that thereafter and on or about the 29th day of December, 1943, pursuant to said suggestion and request last mentioned, Defendant Ben Liebman, California Electric Supply Company, a corporation, and John O. England as trustee of the said Aetna Electric Company, a corporation, entered into a written stipulation, a copy of which is hereby marked Exhibit "A," attached hereto and made a part hereof, [10] wherein and whereby it was stipulated that Ben Liebman is indebted to Aetna Electric Company, a corporation, said bankrupt, in the sum of \$3230.67 and that California Electric Supply Company, the plaintiff herein, a creditor of said bankrupt corporation, has filed its Proof of Claim in the sum of \$1438.52, to which said Proof of Claim there was attached a copy of a Notice addressed to said Ben Liebman to withhold payment of said amount owing by him to said bankrupt corporation and wherein it was stipulated that John O. England as trustee has made demand upon the said Ben Liebman for the payment of the sum of \$3230.67 and that the said Ben Liebman has refrained from making payment of

the sum of \$1438.52 of said amount upon advice of his counsel on account of said Notice of California Electric Supply Company, a corporation, to withhold as hereinabove set forth, and wherein it was further stipulated that the said California Electric Supply Company, a corporation, the plaintiff herein, consents that the sum of \$1438.52 be paid by Ben Liebman, one of the defendants herein, to John O. England, as trustee in bankruptcy, providing said John O. England agrees to hold said entire sum until the further order of said District Court, and it was further provided in said stipulation that John O. England as trustee in bankruptcy agrees with Ben Liebman and California Electric Supply Company, a corporation, to accept the sum of \$1438.52 from Ben Liebman and to hold the entire amount until further order of the above entitled Court;

That thereafter and on the 4th day of January, 1944, the original of the hereinabove stipulation, Exhibit "A" herein, was filed in said bankruptcy proceeding entitled, "In the Matter of Aetna Electric Company, a corporation, bankrupt";

That on the 29th day of December, 1943, there was paid by the defendant herein, Ben Liebman, pursuant to said stipulation, Exhibit "A" herein, to John O. England, as trustee of Aetna Electric Company, a corporation, bankrupt, the sum of [11] \$3159.67, which represented the full amount due the Aetna Electric Company of \$3230.67, less the sum of \$71.00 which was deducted from the amount due said Aetna Electric Company, a corporation, be-



cause of the failure of said Aetna Electric Company to supply certain labor and material upon said contract job;

That said John O. England accepted said sum of \$3159.67 pursuant to said stipulation filed on said 4th day of January, 1944, in said bankruptcy proceeding hereinabove described;

That included in said sum of \$3159.67 last herein mentioned is said sum of \$1438.52 hereinbefore mentioned;

That said California Electric Supply Company, a corporation, orally agreed with said Ben Liebman that upon said deposit of said sum of \$1438.52 with said John O. England, trustee in bankruptcy aforesaid, that said California Electric Supply Company, a corporation, would release said Ben Liebman from all liabilities, claims and demands of every kind, character and description arising out of the matters and things in said complaint on file herein set forth;

That by reason of the matters and things hereinabove set forth these answering defendants allege that said plaintiff herein is estopped from recovering from these answering defendants or either of them said sum of \$1438.52, or any part thereof.

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And Now by Way of a Further and Separate and Distinct and Third Answer and defense to the complaint of plaintiff, said answering defendants allege:

## I.

That the answering defendant herein Ben Liebman, also known as B. Liebman, at no time entered into any contract, written or otherwise, with said California Electric Company for the furnishing, supplying or installing of electrical fixtures and materials in said housing project identified in said complaint on file herein; that at all of the times herein mentioned the defendant Ben Liebman had [12] contracted with the Aetna Electric Company, a corporation, and with no other firm or person, for the furnishing, supplying and installing of electrical fixtures and materials upon said housing project identified in said complaint of plaintiff on file herein; that any purported furnishing, supplying or installing of electrical fixtures and materials in said housing project, if any, by said California Electric Company, a corporation, the plaintiff herein, was done without the knowledge, permission or consent of the defendant Ben Liebman herein; that your petitioner is informed and believes and upon such information and belief therefore alleges that said plaintiff California Electric Supply Company, a corporation, did not at any time install, furnish or supply any electrical fixtures and materials in said housing project hereinabove referred to;

Wherefore said answering defendants pray that plaintiff take nothing by its complaint on file herein and that they and each of them be hence dismissed with their costs of suit incurred herein.

JOHN J. TAAFFE

JOSEPH C. HAUGHEY

State of California,  
City and County of San Francisco—ss.

Ben Liebman, also known as B. Liebman, being first duly sworn, deposes and says:

That he is one of the answering defendants above named and makes this verification for and on behalf of himself and the other answering defendant herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief and as to those matters that he believes it to be true.

BEN LIEBMAN

Subscribed and sworn to before me this 15th day of June, 1944.

[Seal]

JACOB S. MEYER

Court Commissioner of the City and County of San Francisco, State of California. [13]

### EXHIBIT "A"

In the Southern Division of the United States District Court for the Northern District of California

No. 35800-R—In Bankruptcy

In the Matter of Aetna Electric Co., a corporation,  
Bankrupt.

### STIPULATION

It is hereby stipulated by and between Ben Liebman, California Electric Supply Company, a corporation, and John O. England, as Trustee in Bank-

ruptey of the above bankrupt corporation, as follows:

1.

That Ben Liebman is indebted to Aetna Electric Co., the above named bankrupt corporation in the sum of \$3230.67 and that California Electric Supply Company, a creditor of said bankrupt corporation, has filed its proof of claim in the sum of \$1438.52 to which said proof of claim is attached a copy of a Notice [14] addressed to said Ben Liebman to withhold payment of said amount owing by him to the bankrupt corporation being a portion of his total indebtedness of \$3230.67.

2.

That John O. England, as Trustee, has made demand upon Ben Liebman for the payment of said sum of \$3230.67 and the said Ben Liebman has refrained from making payment of \$1438.52 of said amount upon advice of his counsel on account of said Notice of California Electric Supply Company, a corporation, to withhold referred to in the preceding paragraph.

3.

That California Electric Supply Company, a corporation, consents that the said sum of \$1438.52 be paid by Ben Liebman to John O. England, as Trustee in Bankruptcy, providing he agrees to hold said entire sum until the further Order of the above entitled Court.

4.

That John O. England, as Trustee in Bankruptcy,



agrees with Ben Liebman and California Electric Supply Company, a corporation, to accept the sum of \$1438.52 from Ben Leibman and to hold the entire amount until the further Order of the above entitled Court.

Dated this 29th day of December, 1943.

B. LIEBMAN

California Electric Supply  
Company, a corporation

By EDWARD T. MANCUSO

Its Attorney

JOHN O. ENGLAND

Trustee of the bankrupt estate of Aetna Electric  
Co., a corporation

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed June 13, 1944. [15]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above entitled cause came on regularly for trial on the 8th day of February, 1945, before the court sitting without a jury, a jury having been expressly waived; Edward T. Mancuso and Leslie M. Julian appearing as counsel for the plaintiff, and Joseph C. Haughey appearing as counsel for the defendants, Jeanette Liebman, administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, and Massachusetts Bonding and

Insurance Company, a corporation, and after hearing the allegations and proofs of the parties, the arguments of counsel, and being duly advised in the premises, the following findings of fact and conclusions of law constituting the decision of the court in said action are hereby made.

### I.

That each and all of the allegations set forth in [16] Paragraphs II, III, IV, V and VI of the complaint and admitted in defendants' answer are true, and that said contract as alleged in Paragraph IV of said complaint was completed by Ben Liebman on or about the 17th day of May, 1943.

### II.

That between the 25th day of February, 1943 and the 30th day of April, 1943 the Aetna Electric Company, a subcontractor of defendant, Ben Liebman, also known as B. Liebman, became indebted to the California Electric Supply Company for electrical supplies and materials furnished them at their special instance and request and used on and affixed to said construction project alleged in Paragraph IV of said complaint in the sum of \$1,438.52; that the said electrical supplies and materials were reasonably worth the sum of \$1,438.52; that no part of the same has been paid; that the whole thereof is now due, owing and unpaid; that said amount is to be reduced by any amount heretofore or hereafter paid on account of said claim from and out of the estate of Aetna Electric Company, a corporation, bankrupt.

## III.

That all the facts and allegations set forth in Paragraph VI of plaintiff's complaint and denied in defendant's answer are true.

## IV.

That Jeanette Liebman, as administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, by stipulation is substituted in the place and stead of Ben Liebman, also known as B. Liebman, deceased, in so far as the same may be necessary for a complete determination of this action.

## V.

That each and all of the allegations set forth in defendant's answer to plaintiff's complaint are untrue, except that the stipulation set up as Exhibit "A" in said Answer was entered into on the date therein stated and was filed with the referee in bankruptcy as alleged and said sum of \$1438.52 mentioned in said stipulation was deposited with the Trustee in Bankruptcy. [17]

## VI.

That the defendant, Massachusetts Bonding and Insurance Company, a corporation, as surety on the payment bond, and Jeanette Liebman, as administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, are jointly and severally liable to pay said clam of plaintiff herein.

From The Foregoing Facts, The Court Concludes:—

I.

That the plaintiff is entitled to Judgment jointly and severally against Jeanette Liebman as administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, and the Massachusetts Bonding And Insurance Company, a corporation, in the sum of \$1,438.52, together with interest thereon at the rate of seven per cent (7%) per annum from the 24th day of May, 1943, said Judgment to be reduced by any amounts heretofore or hereafter paid to plaintiff on account of said claim from and out of the estate of Aetna Electric Company, bankrupt.

The plaintiff is entitled to Judgment for his costs and disbursements incurred or expended herein.

Let Judgment Be Entered Accordingly.

Dated: This 12th day of February, 1945.

JOHN C. BOWEN

Judge of the U. S. District  
Court

Presented by

LESLIE M. JULIAN

Of counsel for Pltff.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Feb. 12, 1945. [18]



In the Southern Division of the United States District Court — Northern District of California

No. 23289-S

UNITED STATES OF AMERICA for the use  
and benefit of CALIFORNIA ELECTRIC  
SUPPLY COMPANY, a corporation,  
Plaintiff,

vs.

BEN LIEBMAN, also known as B. LIEBMAN,  
MASSACHUSETTS BONDING AND IN-  
SURANCE COMPANY, a corporation, First  
Doe, Second Doe, Black and White Corpora-  
tion,

Defendants.

### JUDGMENT

This cause came on regularly for trial before the court sitting without a jury, on the 8th day of February, 1945, Edward T. Mancuso and Leslie M. Julian appeared as attorneys for the plaintiff, and Joseph C. Haughey appeared as attorneys for the defendants, Jeanette Liebman, administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, and Massachusetts Bonding And Insurance Company, a corporation, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith;

Now Therefore, By Reason Of The Law And Findings Aforesaid, It Is Hereby Ordered, Adjudged And Decreed: [19]

That plaintiff, the California Electric Supply Company, a corporation, have Judgment against Jeanette Liebman, administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, and Massachusetts Bonding And Insurance Company, a corporation, jointly and severally, in the sum of One Thousand Four Hundred Thirty-Eight Dollars and Fifty-Two Cents (\$1,438.52), together with interest thereon at the rate of seven per cent (7%) per annum from the 24th day of May, 1943, until paid, to be reduced by any amounts heretofore or hereafter paid on account of said claim from and out of the estate of Aetna Electric Company, a corporation, a bankrupt.

That plaintiff, the California Electric Supply Company, a corporation, have Judgment against Jeanette Liebman, as administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased, and Massachusetts Bonding And Insurance Company, a corporation, jointly and severally, for his costs taxed at \$30.39.

Dated: This 12th Day of February, 1945.

JOHN C. BOWEN

Judge of the U. S. District  
Court

Findings of Fact and Conclusions of Law Judgment submitted and presented this 12th day of February, 1945.

LESLIE M. JULIAN

Counsel for Plaintiff.

[Endorsed]: Filed Feb. 12, 1945. [20]

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[Title of District Court and Cause.]

### ORDER

Defendants' "Notice of Intention to Move for a New Trial", regarded by counsel and by the Court as a Motion for New Trial, having been presented and having by both sides been submitted to the Court for decision, and the matter having been taken under advisement by the Court, and the Court being now of the opinion that said motion should be overruled, and being otherwise fully advised in the premises; now, therefore, it is hereby

Ordered that Defendants' Motion for New Trial (denominated "Notice of Intention to Move for a New Trial") be, and hereby is, denied.

Exception allowed Defendants.

Dated at Seattle, Washington, this 19th day of March, 1945.

JOHN C. BOWEN

United States District Judge

[Endorsed]: Filed Mar. 22, 1945. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Jeanette Liebman, administratrix of the estate of Ben Liebman, also known as B. Liebman, deceased; Massachusetts Bond And Insurance Co., a corporation, the defendants in the above entitled action, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment heretofore, to-wit, on the 12th day of February, 1945, given, made and entered in and by the *by the* District Court of the United States for the Northern District of California, Southern Division, in the above entitled action and from the whole of said Judgment, which said Judgment is in the words and figures following, to-wit:

(Here Follows The Judgment Which Has Been Copied)

Dated: April 17th, 1945.

JOSEPH C. HAUGHEY

Attorney for defendants and  
appellants.

(Acknowledgment of Receipt of Copy)

[Endorsed]: Filed Apr. 20, 1945. [22]



[Title of District Court and Cause.]

STATEMENT OF THE POINTS ON WHICH  
APPELLANTS INTEND TO RELY ON AP-  
PEAL

Now come the above named appellants and pursuant to the provisions of Section (6) of Rule 19 of this Court file this, their statement of the Points on which they intend to rely on the appeal, and designate herewith the parts of the record which they think necessary for the consideration thereof. In this behalf the said appellants hereby adopt their statement of points on which appellants intend to rely on appeal filed in the District Court of the United States for the Northern District of California, Southern Division, the Court from which this appeal is taken, which statement is a part of the Record on Appeal in the above entitled cause; and appellants hereby [23] designate all of the said Record on Appeal as necessary for the consideration of said appeal.

Dated: This 17th day of April, 1945.

JOSEPH C. HAUGHEY

Attorney for Defendants and  
Appellants.

Receipt of a copy of the within Statement is hereby acknowledged this 17th day of April, 1945.

EDWARD T. MANCUSO

Attorney for Plaintiff and  
Appellee.

[Endorsed]: Filed Apr. 20, 1945. [24]

[Title of District Court and Cause.]

DESIGNATION OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Come now the above named defendants, and, pursuant to the provisions of Subdivision (d) of Rule 75 of the Federal Rules of Civil Procedure, file this, their designation of the points on which they intend to rely on their appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1. That the District Court erred in granting judgment for the plaintiff;

2. That the District Court erred in ruling that the written stipulation entered into between the plaintiff and the defendant Liebman and the trustee in bankruptcy did not release [25] the defendant Liebman and his surety Massachusetts Bonding and Insurance Company from the Obligation sued upon;

3. That the District Court erred in ruling that the Miller Act (40 U.S.C.A. 270(b) ) is a special suretyship right;

4. That the District Court erred in holding that the written stipulation entered into between the plaintiff and the defendant Liebman and the trustee in bankruptcy did not constitute a waiver by the plaintiff of its rights under the Miller Act (40 U.S.C.A. 270(b) );

5. That the District Court erred in ruling that upon the facts and the law plaintiff had shown a right to recovery.

Dated: This 17th day of April, 1945.

JOSEPH C. HAUGHEY

Attorney for Defendants and  
Appellants.

Receipt of a copy of the foregoing Designation of Points is hereby acknowledged this 17th day of April, 1945.

EDWARD T. MANCUSO

Attorney for Plaintiff and  
Appellee.

[Endorsed]: Filed Apr. 20, 1945. [26]

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Come now the above named defendants and, pursuant to the provisions of Rule 75 of the Federal Rules of Civil Procedure file this, their Designation of the portions of the Record, Proceedings and Evidence to be contained in the Record on their appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The caption.
2. The names and addresses of counsel.
3. The complaint.
4. The answer of defendants.
5. Findings of Fact and Conclusions of Law.
6. The Judgment.
7. Notice of Appeal.

8. Designation of contents of Record on Appeal.
9. Statement of Points on which appellants intend to rely on the appeal.
10. The full and complete Reporter's Transcript of the testimony, direct and cross-examination, of Edward T. Mancuso and of Joseph C. Haughey given upon the trial.
11. Memorandum Opinion of the Court.

Dated: This 17th day of April, 1945.

JOSEPH C. HAUGHEY

Attorney for defendants and  
appellants.

Receipt of a copy of the foregoing Designation of Contents of Record on Appeal is hereby acknowledged this 17th day of April, 1945.

EDWARD T. MANCUSO

Attorney for Plaintiff and  
Appellee.

[Endorsed]: Filed Apr. 20, 1945. [28]

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[Title of District Court and Cause.]

#### ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants may have to and including July 9, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.



Dated: May 29, 1945.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed May 29, 1945. [29]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to and including July 19, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: July 9, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed July 9, 1945. [30]

In the Southern Division of the United States  
District Court, In and For the Northern Dis-  
trict of California

No. 23,289

UNITED STATES OF AMERICA, For the Use  
and Benefit of CALIFORNIA ELECTRIC  
SUPPLY COMPANY,

Plaintiff,

vs.

BEN LIEBMAN, also known as B. LIEBMAN,  
The MASSACHUSETTS BONDING INSUR-  
ANCE COMPANY, a corporation, et al.,

Defendants.

Monday, February 5, 1945

Before: Hon. John C. Bowen,  
Judge.

Counsel Appearing:

For Plaintiff:

Edward T. Mancuso, Esq.

L. M. Julian, Esq.

For Defendants:

Joseph C. Haughey, Esq.

EDWARD T. MANCUSO,

called as a witness by plaintiff; sworn.

The Clerk: Will you please state your name to  
the court?

A. Edward T. Mancuso, 60 Urbano Drive, San  
Francisco.

(Testimony of Edward T. Mancuso.)

Mr. Julian: Q. Now, Mr. Mancuso, you were attorney for [31] Mr. McDonnell of the California Electric Supply Company in February, March and April, 1943?

A. Yes.

Q. In that capacity you did certain acts in the process of collecting the claim which is the subject of this suit, \$1438.52?

A. That is correct, yes.

Q. Will you describe to the court in as chronological way as possible just what steps you took with respect to this claim?

A. In the early part of May, 1943, Mr. McDonnell, of the California Electric Company, consulted me about the indebtedness owing by the Aetna Electric Company on the Oakland Airport job in the sum of \$1438.52, and told me that although he had had discussions with Mr. Liebman concerning the job, that Mr. Liebman was the general contractor, and also that the Aetna Electric Company had not received all payments on the job, and he was fearful of the fact that the job might go sour. He advised me that the Aetna Electric Company had been advising him that they had money coming from the general contractor and it had not been paid.

Mr. Haughey: I am going to object to this as hearsay as against the defendants Liebman and the Massachusetts Bonding Company, that he advised that defendant was going sour.

Mr. Julian: It is all part of the transaction.

(Testimony of Edward T. Mancuso.)

A. I was advised by Mr. McDonnell that the California Electric Supply Company, in other words, as I said——

The Court: That objection is overruled. Do not state [32] what he told you, just leave it where you have already stated.

A. He wanted to know what his legal rights were under the circumstances, so I asked Mr. McDonnell if the job was bonded, and he advised me that it was, so I told him that the step that was necessary would be to file a verified notice to withhold payment.

The Court: I doubt if the witness should be permitted to state that. You can state what you did. He consulted with you concerning the matter and you did certain things for him.

A. Well, that is what I was just going to say.

Mr. Haughey: I think we could shorten this. We can stipulate that on behalf of the California Electric Supply Company, Mr. Mancuso, as its attorney, served upon the United States Engineer a notice to withhold payment of money due by Liebman to Aetna Electrical Supply Company. Is that right?

A. Yes, that was on May 24.

Mr. Haughey: We will stipulate to that, and pursuant to that notice was served on the United States Engineers and notice was served on Mr. Liebman.

A. Yes.



(Testimony of Edward T. Mancuso.)

Mr. Julian: This was done on or about May 24, 1943, is that correct?

A. That is correct. And on the same day I notified the Massachusetts Bonding Company. I think I have a copy of the letter.

Mr. Haughey: We can stipulate that the correspondence [33] had between Mr. Mancuso and the Massachusetts Bonding Company go in evidence.

A. The letter I was referring to, if your Honor please, is not here, but is in the Bankruptcy Court, and on the same day I notified, that was May 24, 1943, the Massachusetts Bonding Insurance Company that I had served the withholding notice on the United States Engineers and also on Mr. Ben Liebman, and immediately thereafter I received a telephone call from Mr. Liebman advising me of the receipt of the withholding notice, verified withholding notice, and asked me what he was supposed to do.

Mr. Julian: This is going in by stipulation as a copy of the withholding notice.

The Witness: The instrument that I mean is identified as Exhibit No. 11; that is a copy of the notice to withhold.

Mr. Haughey: At this time, if your Honor please, the defendant Ben Liebman and Massachusetts Bonding Insurance Company will stipulate that the exhibits already marked for identification Plaintiff's No. 2 to 11 inclusive may be entered in evidence.

The Court: Do you offer them?

(Testimony of Edward T. Mancuso.)

Mr. Julian: Yes.

The Court: These exhibits, each and all of them, are now admitted. You may read any part of one or call the witness' attention to any part of one or all of the exhibits that you wish. [34]

Mr. Julian: Q. Will you continue on with your testimony, Mr. Mancuso?

A. Exhibit No. 11 of plaintiff is a copy of the notice to withhold payment, a verified claim that I prepared and served on Mr. Liebman and the United States Engineers, and as I said, several days after that had been served upon Mr. Liebman he phoned me at my office and advised me that he had discussed this matter with Mr. McDonnell since he had received this notice to withhold payment, and that he was owing to the Aetna Electric Company approximately \$3000 that still had not been paid by the United States Engineers, and asked me what he should do under the circumstances, and I said, I advised Mr. Liebman at that time to take the matter up with his attorney, at which time he advised me that he did not have an attorney, and that he had informed Mr. McDonnell that he would see that this claim was paid, but he did not understand why the verified notice to withhold payment was served upon him. So I explained to Mr. Liebman at that time that was a step that we had to take as a necessary precaution to protect ourselves under the Miller Act. Thereafter, approximately a period of about a week or ten days I received another telephone call from Mr. Liebman.

(Testimony of Edward T. Mancuso.)

Mr. Haughey: Will you fix that date?

A. I would say that was the early part of June, 1943, sometime between the 3rd and 6th, in that neighborhood, advising me [35] that he had been consulting with Mr. McDonnell again and wanted to know if I had any suggestion to make, and I said, "The only suggestion that I can make, Mr. Liebman, is that you pay the amount of this claim." And he again advised me that he still had not received the money from the United States Engineers Office, and that as soon as it would be paid he would see that the claim was paid to the California Electric Supply Company. Immediately following that conversation, within a period of the next two weeks, I received a telephone call from a group of attorneys here, of which Mr. May was one, advising me that he would call on me in behalf of the indebtedness owing by the Aetna Electric Company to the California Electric Supply Company, and stating that in going over the records he found that they were in a very embarrassing situation, and wanted to know if we would accept 50 cents on the dollar in settlement of the amount of that claim, together with the amount that was owing on the books to the California Electric Supply Company, which totaled in the neighborhood of \$3000; in other words, the total claim at that time was around \$4400. I advised Mr. May that I would consult with my client, which I did, and I subsequently advised Mr. May we would accept 50 cents on the dollar on the open book account of the Aetna Elec-

(Testimony of Edward T. Mancuso.)

tric Company, but would not accept 50 cents on a dollar on the claim owing on the Oakland Airport, due to the fact that it was my opinion that we had a priority claim, that we could look to the bonding [36] company for payment, and under the circumstances I felt that we were justified in taking that position. About two weeks later, which was the latter part of June or around the first of July, somewhere, along there, I received another telephone call from Mr. May's office, advising me that due to the fact that California Electric Supply Company would not care to accept 50 cents on the dollar they were fearful that the Aetna Electric Company would have to go into bankruptcy, and asked me if I would not again care to accept 50 cents on the dollar on behalf of my client, and I took the position at that time that we had said prior that we would accept 50 cents on the dollar for the open book account, but that we demanded the full payment of the claim of \$1438, and at that time I was advised by them as far as we were concerned we could proceed under the Miller Act, and I told them I would stand on that right. Subsequent to that, the next thing that took place was the notification of the fact that the Aetna Electric Company had filed a petition in bankruptcy in the district court, which I believe was in August of 1943.

Mr. Haughey: I think that is right.

A. I immediately then filed a claim with the bankruptcy court, setting forth the total amount



(Testimony of Edward T. Mancuso.)

of the indebtedness owed by the Aetna Electric Company, and also contended that \$1438 of that amount represented a priority claim, and I also served in the bankruptcy court a notice to withhold. Subsequent to [37] the filing of that claim I received notice from the attorney, Mr. Conners, representing the Trustee in Bankruptcy, that they could not accept the claim as a priority claim and advised me that as far as they were concerned that the assets that were going to the Aetna Electric Company by Ben Liebman were distributable to the general creditors, and as attorney for the bankrupt, attorney for the trustee for the bankrupt he would have to demand that Ben Liebman pay over to the bankruptcy court all of the money that was owing. As a result of that I filed a petition in the bankruptcy court to established the claim of \$1438.52 as a priority claim under the basis of the Miller Act.

The Court: Against the estate of the bankrupt?

A. Against the trustee and against the bankrupt estate, and that was the matter before Judge Wyman; the attorneys representing Massachusetts Bonding Company did not appear, nor did the attorney representing Mr. Liebman, and we produced evidence through Mr. McDonnell of the California Electric Supply Company establishing the amount of the claim, and Judge Wyman, on the objection of Mr. Conners, refused to admit the testimony in evidence, Judge Wyman stating that as far as he was concerned that any claim that the California

(Testimony of Edward T. Mancuso.)

Electric Company might have against the Aetna Electric Company and Ben Liebman on the bond was a separate and distinct transaction from the bankruptcy court, that as far as the bankruptcy court was concerned that any money that was owing by Liebman to California Electric [38] Supply Company were assets that were owing to the trustee and the trustee could received them for the general creditors. Then I made an offer of proof to the bankruptcy court of the evidence to sustain our claim and submitted the case, with the understanding that the judge would receive briefs, I think the time allowed for them was 5, 5 and 3. Subsequent to that time, Mr. Connors and myself appeared before Judge Wyman and on that particular date Mr. McDonnell was not present, and discussed with him the briefs that had been filed. Judge Wyman called to our attention that we were really discussing a moot question in that the trustee had not yet received any money from Mr. Liebman, that Mr. Liebman had not paid the money over to the bankruptcy court, and that before the judge could make a ruling on the matter it would be necessary that the amount that Mr. Liebman owed to the Aetna Electric Company would have to be paid into the bankruptcy court. So I advised the judge at that time that as far as we were concerned we had spoken to Mr. Liebman about that, and Mr. Liebman on the advice of his attorney had informed us that he would not make any payment until a court order was made. So Judge Wyman at that time then sug-

(Testimony of Edward T. Mancuso.)

gested that if I would communicate with the attorney representing Mr. Liebman and see if I could get him to deposit the money in court it would do away with the necessity of the trustee filing a suit against Mr. Liebman for the purpose of compelling him to pay the money into court. [39] So I then consulted with Mr. Haughey and explained to him what had taken place, and that the bankruptcy court was very much put out over the fact that there was no appearance by the bonding company and by the attorney representing Mr. Liebman, and that Judge Wyman had suggested that a stipulation be entered into for the purpose of depositing this money in the court so that it would not be necessary to file a suit by the trustee.

Mr. Julian: May I interrupt just a moment? You are referring now to the stipulation which is appended to the defendant answer as an exhibit, is that correct?

A. That is correct. When we discussed the matter about the stipulation with the judge when he suggested a stipulation, I advised Judge Wyman that I was not familiar with the proceedings before the bankruptcy court and the Federal court, and that I did not want to jeopardize any right I might have to proceed against the bonding company in case this stipulation was entered into. Judge Wyman advised me at that time——

Mr. Haughey: Just a moment, I am going to object to this as hearsay and not binding upon the defendants.

(Testimony of Edward T. Mancuso.)

The Court: He can say what he did and what Judge Wyman did is a matter of public record.

Mr. Haughey: That is correct. The court can take judicial notice of what Judge Wyman did.

The Court: Do not say what he said unless he said it in the course of an opinion, in some authoritative way. [40]

A. If your Honor please, the judge was on the bench and Mr. Connors and myself were discussing with him the fact that there had been no appearance by these other parties, and it was a moot question as far as he was concerned, and he would not rule upon it until the money was before the court, and Judge Wyman suggested that a stipulation could be entered into whereby this money could be paid into court.

Mr. Haughey: I am going to object to this on the ground it is hearsay and not binding on the defendant.

The Court: If pursuant to some suggestion Judge Wyman made a stipulation was entered into that is all right, if you wish to put it that way, but do not state what he said.

A. Pursuant to the request of Judge Wyman I consulted with the attorneys representing Mr. Liebman and wanted to know if they would be interested in entering into a stipulation. I explained to them, to Mr. Haughey, that I had advised Judge Wyman that I was not going to enter into this stipulation if that would jeopardize the rights of the California



(Testimony of Edward T. Mancuso.)

Electric Supply Company to proceed on the bond against Mr. Liebman in case the court should hold that we did not have a priority claim. I also advised him at that time that Judge Wyman had informed me that the only way the bankruptcy court could proceed with the matter further would be for this stipulation to be entered into, and at that time also had advised me that the right of the California Electric Supply Company against Liebman and the bonding company [41] was a separate and distinct transaction from the matter that was before the bankruptcy court; that any determination that they might make in that connection might result in Ben Liebman paying the claim twice.

Mr. Haughey: If your Honor please, I am going to object to this testimony and ask that it be stricken. It is an attempt to vary the terms of a written contract. It is our position that the stipulation is a written contract, and this particular evidence is an attempt to vary the terms of it.

Mr. Julian: This is a conversation which took place between the parties who made the contract, and the preliminary steps do not necessarily vary, but rather explain the contract.

The Court: Isn't it a fact that after all of the conference and all of the statements of the Referee in Bankruptcy the parties undertook to put in the form of a written instrument their arrangement?

Mr. Julian: That is correct.

The Court: The objection is sustained.

(Testimony of Edward T. Mancuso.)

A. After I had my conversation with Mr. Haughey I entered into the stipulation which is Exhibit A of the Defendants' Answer. Upon that stipulation being entered into, Mr. Liebman, I was informed, deposited the money with the bankruptcy court and a new date was set for hearing of the petition to establish our priority claim, and at the request of the referee I also served a copy of that notice of hearing on the bonding company and on [42] the attorney representing Mr. Liebman. At the time that matter came up for hearing there was still no appearance by anyone other than myself and Mr. Connors, at which time the matter was taken under submission by Judge Wyman, who subsequently rendered his decision rejecting our claim as a priority claim, and then we subsequently filed an appeal to the court of appeals, and Judge Roche sustained the ruling of Judge Wyman to the effect that the funds in the hands of the trustee which we had received from Mr. Liebman were funds from the general creditors and that we were not entitled to establish a priority to any portion thereof. Subsequent to that the bankruptcy court then served notice upon our office that they were going to proceed for the purpose of determining our claim, if there was any claim, and set it on the calendar, and through stipulation they agreed to acknowledge it as a general claim; in other words, the total indebtedness was approximately forty-two hundred and some odd dollars; in other words, they acknowledged it as a general claim of California

(Testimony of Edward T. Mancuso.)

Electric Supply Company against Aetna Electric Company.

The Court: In other words, the general unsecured claim of the California Electric Supply Company against the bankrupt estate of the Aetna Electric was allowed in the total sum of that larger sum there mentioned?

A. Yes.

Q. Which included this claim of \$1438.52 for material delivered to the Oakland Airport job and the subcontractor job of [43] the Aetna Electric Company?

A. Yes.

Q. Is that right?

A. That is correct. Since then we have received nothing from the bankruptcy court for the settlement of the account and have up to the present received no payment thereon, and we have been advised that there will be a remittance somewhere in the neighborhood of 20 or 25 per cent on that claim, and that money has not been paid up to the present time. I have some correspondence here that I had with the bonding company, advising them of the status of the claim of Mr. Liebman which has already been introduced in evidence.

The Court: May I see those?

A. One I believe, your Honor, is from the United States Engineers as to the date of completion. We were interested in that date and they advised us by letter which was introduced that the

(Testimony of Edward T. Mancuso.)

job was completed on I believe the 17th of May, 1943.

Mr. Julian: I think you are in error. It was the 7th of September, 1943.

A. Yes. I subsequently received a notice from the Federal Government in Washington that final payment was made on the job on September 7, 1943.

The Court: Mr. Mancuso, did the trustee in bankruptcy ever receive from Mr. Liebman any item including \$1438.52 which they owed to the plaintiff in this case?

A. Mr. England received from Mr. Liebman the amount of money that was owing to the Aetna Electric Company, according to his record, less the \$1438.52 prior to entering into a stipulation, and after the [44] stipulation was entered into Mr. Liebman paid over to him the sum of \$1438.52 additional.

Q. From the account of the Aetna Electric and the bonding company?

A. As an indebtedness owing to the Aetna Electric Company.

The Court: We will take a recess now until 2:15.

(A recess was thereupon taken until 2:15 p.m.) [45]



Afternoon Session, 2:15 O'Clock p. m.

EDWARD T. MANCUSO,  
recalled:

Cross-Examination

Mr. Haughey: Q. Mr. Mancuso, do you recall on or about the month of December, 1943, telephoning me in connection with the conversation you had with Referee Wyman? A. I do.

Q. Do you recall at that time suggesting to me as one of the attorneys for Mr. Liebman that the money should be paid over to the trustee in bankruptcy?

A. I told you that the referee in bankruptcy said that the money had to be paid into the trustee.

Q. You told me at that time that Liebman should pay the money that he owed the Aetna Electric Company over to the trustee in bankruptcy, is that right?

A. I told you that Judge Wyman informed me that if the money was not paid in voluntarily it would be necessary for the trustee to file suit and that he recommended that we enter into a stipulation that the money be paid to the trustee.

Q. Now, didn't you at that time also tell me, Mr. Mancuso, that the money would be taken over to the trustee in bankruptcy, and that the money claimed by the California Electric Supply Company would be earmarked? Do you remember using that term?

A. I used the word "earmarked." I said that the court, Mr. Wyman, said if the money was turned in to the bankruptcy court by stipulation it would be earmarked and held by the trustee [46] until

(Testimony of Edward T. Mancuso.)

there was a determination of the priority claim filed by the California Electric Supply Company.

Q. And did you also say at that time that Liebman should pay the money over to the trustee so that he would avoid liability for payment of this amount twice under that bond?

A. No, I don't recall that.

Q. You don't recall that?

A. No, I recall positively I did not make that statement.

Q. All right now, Mr. Mancuso, will this refresh your recollection: Didn't I tell you during the course of our conversation that this entire transaction was Greek to me and that if you wanted it done I would rather have a letter to that effect?

A. I don't remember that. I remember that I questioned you as to why you were not in court, and you told me that you were not requested to be in court by either Mr. Liebman or the bonding company, and I subsequently advised you that when I had served the bonding company with the notice to appear at the second hearing that they had informed me that they had requested Mr. Taaffe's office to represent them on that bankruptcy matter.

Q. You have no recollection of mentioning that if Liebman did not pay he would probably be liable for payment twice under that bond?

A. No, I do not. When I discussed the question of entering into the stipulation I believe I asked you to prepare the stipulation, isn't that correct, Mr. Haughey?

(Testimony of Edward T. Mancuso.)

Mr. Haughey: Will you mark this for identification Defendants' [47] Exhibit A-2 For Identification, mark this A-3 For Identification, this A-4 For Identification, and this A-5 For Identification.

Q. Mr. Mancuso, during sometime in the month of December, 1943, your office prepared a stipulation respecting this matter, is that so?

A. I cannot recall whether I prepared this stipulation or you did it; I have been trying to recall; in fact, I just went over to the bankruptcy court and I looked at the original to see who it was prepared by.

Q. I show you what has already been marked Defendants' Exhibit A-2 For Identification, what purports to be a stipulation in the matter of Aetna Electric Company, a corporation, bankrupt, and ask you to inspect that and let us know whether or not that was prepared in your office.

A. As I say, I do not recall whether it was prepared in my office or your office, but this is my signature on this stipulation. I really could not recall.

Q. Have you any of your stationery here today?

A. Yes, I have a lot of it here.

The Court: Is that of vital importance?

Mr. Haughey: My purpose in doing this is to show this emanated from the office of Mr. Mancuso, and in fact Mr. Taaffe and myself as attorneys did not see this until it was received by us from Mr. Mancuso's office, and then in turn by us forwarded to Mr. Liebman.

A. That may be true, I don't remember. [48]

Q. I will show you what has been identified as

(Testimony of Edward T. Mancuso.)

Defendants' Exhibit 3 for Identification, which is a letter on your stationery.      A. Yes.

Q. Did you not sign this letter bearing date December 23, 1943, directed to me, and signed by you? That is your signature, is it not?

A. No, that is my secretary's writing, but that is my statement. I dictated that letter.

Q. And authorized its transmittal?

A. Oh, yes.

Q. Does that refresh your recollection as to whether or not this stipulation was prepared by you?

A. No, it does not, because I kind of seem to recall that I asked you to prepare the stipulation, and then it was sent to me, and then I got the signatures and mailed them to you. I do not recall whether you prepared it or I prepared it.

Q. I show you a stipulation which has been marked Defendants' Exhibit A-2 and ask you to examine that and let me know if your signature is affixed thereto.      A. Yes.

Q. And it is signed on the second page, is that right?      A. That is right.

Q. I also ask you, do you know if that is the signature of John O. England?      A. I think it is.

Mr. Haughey: At this time I ask that there be introduced as Defendants' Exhibit next in order the instrument that has heretofore been identified as A-3 For Identification, and ask that it be deemed in evidence. [49]

Mr. Julian: No objection.

The Court: A-3 is now admitted.



(Testimony of Edward T. Mancuso.)

Mr. Haughey: I would likewise ask that there be introduced in evidence at this time the instrument that has previously been marked as Defendants' Exhibit A-2 For Identification.

Mr. Julian: No objection.

The Court: Admitted.

(The documents referred to were admitted in evidence and marked, respectively, Defendants' Exhibits A-2 and A-3.)

Mr. Haughey: Counsel, will you stipulate that this was received?

Mr. Julian: Yes.

Mr. Haughey: My reference was, your Honor, to Exhibit A-5 For Identification, which is a check signed by B. Liebman, which is check 1595, and by stipulation that may go into evidence.

Mr. Julian: It may go in.

The Court: Exhibit A-5 is now admitted.

(The document was admitted in evidence and marked Defendants' Exhibit A-5.)

Mr. Haughey: Will you stipulate that the original of that letter was sent by Mr. Liebman to Mr. England, the trustee? A. Yes.

Q. And that if Mr. England were called here he would testify that he received the original of this matter, which has been already marked Defendants' No. A-4 For Identification? [50]

A. Yes, we will stipulate to that.

Q. If Mr. England were called here he would admit he received the original of this letter, together

(Testimony of Edward T. Mancuso.)

with the check that has been identified as Defendants' Exhibit A-5. This letter bears date December 29, 1943. It shows J. O. England.

A. Wait a minute. We are not going to stipulate that the letter is binding in any way upon the California Electric Supply Company.

The Court: I would like to know what it is you are referring to. Is it A-5?

Mr. Haughey: The letter is A-4.

The Court: You offer it in evidence now?

Mr. Haughey: Yes, I am offering it in evidence.

The Court: Is there any objection to it?

Mr. Julian: Yes, we object to it to this extent, that there are self-serving declarations in it which do not bind us. It is between two other parties, Mr. Liebman and Mr. England. Mr. England is not a party to this transaction.

Mr. Haughey: They have already stipulated that if Mr. England were called here he would testify that he received the original of this letter.

The Court: You make no objection that the exhibit is a copy instead of this letter.

Mr. Mancuso: We make no objection. We will stipulate if Mr. England was called he would testify he received the [51] original of that together with the check, but we do object to its introduction in evidence in so far as the California Electric Supply Company is concerned, and in this connection it is our contention that it is an entirely self-serving dec-

(Testimony of Edward T. Mancuso.)

laration and has no bearing on this case. Mr. England is not a party to the action.

The Court: Does this amount of money mentioned in the letter, the check being Defendants' Exhibit A-5, include the disputed sum of \$1438.52?

Mr. Haughey: Yes, it does, your Honor.

The Court: The objection is overruled.

Mr. Julian: May we note an exception?

The Court: Defendants' Exhibit A-4 is now admitted in evidence.

(The document was marked Defendants' Exhibit A-4 in evidence.)

Mr. Haughey: That is all with this witness, your Honor.

Mr. Julian: I have no further questions. [52]

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JOSEPH C. HAUGHEY,

called as a witness by the defendants; sworn.

The Witness: I reside at 701 Twenty-fifth Avenue, San Francisco, California. I am an attorney-at-law duly admitted and licensed to practice.

Mr. Julian: We will stipulate to your qualifications.

The Witness: In the month of December, 1943 and for sometime prior thereto, and also after that date, John J. Taaffe and I represented Ben Liebman who was a contractor and builder and one of the defendants in this case. I received a telephone call

(Testimony of Joseph C. Haughey.)

at my office at 630 Phelan Building from Mr. Edward Mancuso, one of the attorneys for the plaintiff in the case. He said that he had been at a hearing held before Burton J. Wyman, the Referee in Bankruptcy, on December 9, 1943, and in connection with the affairs of the Aetna Electric Company and the claim of his client, the California Electric Supply Company, arising out of material furnished by his client on a project over in Oakland known as the Oakland Airport project. He said that it was suggested by Judge Wyman that the money owed by Liebman, which was in excess of \$3,000, be paid over to the trustee in bankruptcy, and that out of that sum of three thousand odd dollars the sum of \$1438, which the California Electric Supply Company is claiming under the withhold notice which they had filed on Liebman and the United Engineers, that that amount, that is \$1438, should be earmarked and set aside until a final [53] determination of the matters involved, so that Liebman would not be liable for payment twice under his bond. When Mr. Mancuso related these matters to me I told him that it was all Greek to me, to repeat it slowly and I would make a memorandum of what he wanted and I would get hold of Liebman either by telephone or writing to him, and I would give him Mr. Mancuso's message. So Mr. Mancuso repeated in detail what he wanted done, because I remarked to him at the time that the subject matter was all Greek to me and I needed some notes in connection with it. So I at that time wrote down and made a memorandum of what was



(Testimony of Joseph C. Haughey.)

requested of Mr. Liebman, and thereupon dictated a letter to Mr. Liebman. There was no mention in the course of our conversation between Mr. Mancuso and me that the California Electric Supply Company was not prejudicing its rights by this arrangement. No discussion was had at all regarding the prejudicing of California Electric Supply Company's rights. Mr. Mancuso did say that if Liebman conformed to this general plan and scheme that it would save him from paying under his bond twice. That was the sum and substance of our conversation. Subsequently I received either two or three copies of a stipulation, the stipulation already being entered in evidence here, and I forwarded it on to Liebman and subsequently—I don't know whether I received the original from Mr. Liebman or whether he mailed it in to Mr. Mancuso, or what happened. I know that they were forwarded to Mr. Liebman and subsequently filed. That is all. [54]

#### Cross-Examination

Mr. Julian: Q. Mr. Haughey, in this stipulation you at no time ever suggested any changes or alterations, did you. A. No.

Q. You accepted it as it was drawn, in its original form? A. That is right.

Q. You appreciated, after reading the stipulation, that it nowhere waived the right provided by the Miller Act?

A. No mention is made in the stipulation regarding waving of any right.

(Testimony of Joseph C. Haughey.)

Q. Isn't that true because you were cognizant of the fact that Mr. Mancuso in his conversation had insisted that he would not waive those rights in behalf of his client?

A. No, that is not so. Mr. Mancuso made no mention of any waiver of rights by the California Electric Supply Company. The matter was not even mentioned, it was not discussed.

Q. Wasn't the possibility of an adverse ruling in the bankruptcy court ever discussed?

A. Never discussed at any time or entered into the stipulation.

Q. You say you made a memorandum of the conversation between yourself and Mr. Mancuso?

A. Rough notes so that I could dictate a letter.

Q. You do not have those notes?

A. Unfortunately I have not.

The Court: You do not have the notes that you made of the conversation?

A. No. All I have is my letter which was written from the notes. If you want to see the letter I have it [55] right here.

Mr. Julian: Q. No. Mr. Mancuso at no time ever requested or suggested the stipulation?

A. He might have requested it, I would not say whether he did or did not.

Q. After you received that stipulation did you go into the matter with Mr. Liebman as well as the bonding company?

A. My recollection is that I showed it to Mr. Taaffe, consulted with him in connection with it. I

(Testimony of Joseph C. Haughey.)

do not know whether Mr. Liebman was in our office when we decided that the stipulation was all right, and it was O.K. for Liebman to sign it. But I know I did consult with him with respect to its provisions and we agreed that the stipulation in its form was all right and Liebman could not be prejudiced by it.

Q. Did you say to him it was all right?

A. Yes, we told him it was O.K. to sign the stipulation.

Q. You never gave a legal opinion other than your own conclusion?

A. That is right, I made no research of the law with respect to the matter.

Mr. Mancuso: Is it all right if I ask a question?

The Court: Any objection to his asking a question? A. No.

Mr. Mancuso: Q. Did you inspect the original on file of this stipulation?

A. You mean in the——

Q. (Interrupting): In the bankruptcy court, or district court. A. Yes, I did. [56]

Q. Isn't it a fact that the original stipulation bears a red line on it?

A. As to that I could not say. I know I inspected it. I can identify this. The writing on Defendants' Exhibit in Evidence A-2 reading: "Filed January 4, 1944, with Referee in Bankruptcy" was written by me in the office of the referee at the time I inspected the original, and at that time I wrote in the signature "B. Liebman" on the copy that I have just put in evidence.

(Testimony of Joseph C. Haughey.)

Q. I think if you will remember you will find that you mailed my office two copies of the original stipulation which bears a red line on it and then I probably typed up a couple of copies and mailed a copy back to you; I think you will find on inspection that I just sent the original stipulation that was drawn on paper from your office rather than my office.

A. It is not on my paper.

Q. Could we get the original, if that would make any difference?

A. It does not make any difference, because we have the signatures of the parties here.

Mr. Mancuso: That is all.

A. In my testimony a moment ago, saying I did not know how many copies I sent to Liebman, I see in my letter I say, "Dear Ben: I am enclosing the original and copy of a stipulation from Edward T. Mancuso which he requests that you sign." So I take it, it is self-evident I received them from you and forwarded them on to him. [57]

Mr. Julian: Q. At what point did you advise Mr. Liebman it was a proper document to sign?

A. I don't know whether it was on this date or at some subsequent date, I don't know, because in my letter to him I stated if the facts as related in the stipulation conformed to his ideas on the subject I would suggest that he sign both these stipulations and return the same to me.

Q. You are not absolutely positive that he so advised you?



(Testimony of Joseph C. Haughey.)

A. I am quite sure that Liebman had phoned me and told me he had signed and returned them to me or to Mr. Mancuso.

Q. Then you wish to correct your former testimony that you advised him in your presence and Mr. Taaffe's presence?

A. When I testified to that I did not say definitely that Mr. Liebman was present. I said that I did counsel with Mr. Taaffe with respect to the situation, and in our opinion the stipulations were all right, and I said in my testimony given on direct examination that I was not sure that Liebman was present.

Mr. Julian: That is all.

[Endorsed]: Filed July 9, 1945. [58]

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[Title of District Court and Cause.]

Monday, February 5, 1945

### OPINION OF COURT

The Court: The oral testimony does not cause the Court to draw a conclusion different from that which the Court would feel that the other evidence required it to draw without the oral testimony.

I have understood during the trial that the defendants, Jeanette Liebman, Administratrix of the Estate of Ben Liebman, deceased, who is substituted for the defendant Ben Liebman, and the Massachusetts Bonding Insurance Company, claim

that this stipulation which is attached as Exhibit A to defendants' answer is in law a receipt and release as to the liability alleged in the cause of action set forth in plaintiff's complaint. [59] The stipulation is not entitled a release, and I find no sentence, clause or language in the stipulation which expressly releases either one of the defendants from the obligation sued upon in this action. It seems to me also that there is no language in the stipulation which by implication or inference conveys such an idea. I have no doubt that Ben Liebman hoped and may have expected that, by depositing this overall sum of \$3,230.67, including \$1,438.52 claimed by the plaintiff, with the Trustee in Bankruptcy, it would result in Mr. Liebman not afterwards having to bother with the proper disposition of that \$1,438.52; and that, by depositing such \$1,438.52 with the Trustee in Bankruptcy under this stipulation, said sum together with the remainder of the overall sum would finally reach the hands of the person legally entitled to it. As I say, I have no doubt that Mr. Liebman may have had some such hope and expectation as that just mentioned as one of the possible objectives in his mind when he made that deposit with the Referee in Bankruptcy pursuant to the terms and conditions of this stipulation. However, rights given by statute and rights given by contract are not taken away by implication or merely by the hope and expectation of only one of the parties in the absence of some circumstance strongly establishing the giving away of such rights.

That leads to the question, what is the true analysis of the right which is here sued upon? I think that the right here sued upon is a special suretyship right in favor of this plaintiff guaranteed by this statute called the Miller Act. Under that statute Mr. Liebman and the Massachusetts Bonding Insurance Company are not called upon to assume as principals the obligations of the Aetna Electric Company to pay the plaintiff for materials furnished by the plaintiff to the Aetna Electric Company, but the Miller Act, by reason of the fact that the plaintiff in this action supplied [60] the electrical material to the Aetna Electric Company for installation in buildings constructed under a government construction program created what I have just described as a special suretyship right in the nature of a guarantee that the principal obligation of the Aetna Electric Company to the plaintiff would be paid, namely, the obligation of the Aetna Electric Company to pay for the supplies furnished to it by the plaintiff. That special suretyship right has not been expressly discharged or acquitted by this stipulation which is attached to the defendants' answer. The Court cannot presume that the parties intended that it should be, in the absence of some expression so stating or some conduct unmistakably pointing to that result.

It is, therefore, the finding, conclusion and decision of this Court that the defendants, Jeanette Liebman, Administratrix of the Estate of Ben Liebman, deceased, and Massachusetts Bonding Insurance Company, are liable to the plaintiff under that

special obligation created by the Miller Act, and that plaintiff have judgment against those defendants in the sum of \$1,438.52, with interest thereon at the rate of seven per cent, and for the costs of this action to be taxed by the clerk.

[Endorsed]: Filed July 10, 1945. [61]

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District Court of the United States,  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 21 pages, numbered from 1 to 61, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of United States of America for use and benefit of California Electric Supply Company, a corporation, Plaintiff, vs. Ben Liebman, etc., Massachusetts Bonding and Insurance Co., a corporation, et al., Defendants No. 23289 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$16.40 and that the said amount has been paid to me by the Attorney for the appellant herein.



In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 11th day of July A. D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

By E. VAN BUREN,

Deputy Clerk. [62]

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[Endorsed]: No. 11102. United States Circuit Court of Appeals for the Ninth Circuit. Ben Liebman, also known as B. Liebman, Massachusetts Bonding and Insurance Company, a Corporation, Appellants, vs. United States of America for the use and benefit of California Electric Supply Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 18, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11,102

BEN LIEBMAN, also known as B. LIEBMAN,  
and the MASSACHUSETTS BONDING AND  
INSURANCE CO., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA for the use and  
benefit of CALIFORNIA ELECTRIC SUP-  
PLY COMPANY, a corporation,

Appellee.

STATEMENT OF POINTS AND  
DESIGNATION

Appellants adopt as their statement of points on appeal the statement of points already contained in the certified typewritten copy of the transcript on file in this case.

And in support of those points appellants designate the entire certified typewritten transcript of record for printing.

Dated this 20th day of August, 1945.

JOSEPH C. HAUGHEY

Attorney for Appellants

[Endorsed]: Filed Aug. 21, 1945. Paul P.  
O'Brien, Clerk.



No. 11,102

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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BEN LIEBMAN, also known as B. Liebman,  
MASSACHUSETTS BONDING AND INSURANCE  
COMPANY (a corporation),

*Appellants,*

VS.

UNITED STATES OF AMERICA for the use and  
benefit of California Electric Supply  
Company (a corporation),

*Appellee.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

**APPELLANTS' OPENING BRIEF.**

---

JOSEPH C. HAUGHEY,

630 Phelan Building, San Francisco 2, California,

*Attorney for Appellants.*

**FILED**

NOV 21 1945

**PAUL P. O'BRIEN,**  
CLERK





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No. 11,102

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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BEN LIEBMAN, also known as B. Liebman,  
MASSACHUSETTS BONDING AND INSURANCE  
COMPANY (a corporation),

*Appellants,*

vs.

UNITED STATES OF AMERICA for the use and  
benefit of California Electric Supply  
Company (a corporation),

*Appellee.*

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

## APPELLANTS' OPENING BRIEF.

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### JURISDICTION.

This suit was filed in the District Court of the United States for the Northern District of California, Southern Division, on the 10th of May, 1944. (Tr. p. 9.)

Plaintiff, a materialman, seeks by its complaint to enforce a liability upon the defendant, a general contractor on a public housing project, and his surety, allegedly imposed by virtue of the provisions of the

Miller (Heard) Act, Title 40 U.S.C.A., section 270, et seq. (Tr. p. 2-9.)

Defendants' answer setting up special defenses was filed on the 13th of June, 1944. (Tr. p. 18.)

Jurisdiction to review the judgment of the Court below is conferred by Title 28, section 225 of the United States Code.

The final judgment of the District Court from which the appeal was taken was entered on February 12, 1945. (Tr. p. 23.)

Defendants' motion for new trial was denied March 19, 1945. (Tr. p. 24.)

The notice of appeal was served and filed in the District Court on April 20, 1945. (Tr. p. 25.)

A designation of points on which appellants intend to rely on appeal was served and filed in this Court on April 20, 1945. (Tr. p. 28.)

A designation of contents of record on appeal was served and filed in this Court on April 20, 1945. (Tr. p. 28.)

An order extending time to July 9, 1945, to file record on appeal in the United States Circuit Court of Appeals, Ninth Circuit, was entered by the District Court on May 29, 1945. (Tr. p. 30.)

An order further extending time to July 19, 1945, to file record on appeal in the United States Circuit Court of Appeals, Ninth Circuit, was entered by the District Court on July 9, 1945. (Tr. p. 30.)

Certificate evidencing the filing of the record on appeal dated July 18, 1945. (Tr. p. 62.)

Order enlarging time to file appellant's opening brief to Nov. 21, 1945, dated Oct. 19, 1945.

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### **STATEMENT OF THE CASE.**

This is a materialman's suit for a money judgment brought under the Miller Act (Title 40, Sec. 270 (a) (b) U.S.C.A.)

The complaint in one count alleges that material amounting to \$1438.52 was furnished by the plaintiffs to the Aetna Electric Company, a sub-contractor of the defendant Ben Liebman, a general contractor; that the material was not paid for; that "Notice to Withhold Payment" and other jurisdictional requirements of the Miller Act had been complied with. (Tr. p. 2-6.)

The defendants' answer admitted a great part of the complaint, and alleged affirmatively that prior to the time the suit was filed, defendant Liebman, at the express request, direction and consent of the plaintiff, had paid the said sum of \$1438.52 under the terms of a written stipulation executed by all parties concerned to the trustee of the bankrupt Aetna Electric Company to be held by him as a special fund pending determination of the Bankruptcy Court of the merits of plaintiff's preferred claim filed in such Court to such sum. That compliance with said stipulation was a payment of the alleged indebtedness, and



that the plaintiff, by inducing and consenting to such a mode of payment had waived the rights conferred by the Miller Act, and was now estopped from asserting such rights, if any.

The facts are undisputed.

The appellant (also referred to as defendant) Ben Liebman, in February, 1943, entered into a contract with the United States of America to construct a certain public housing project in Alameda County, California. The appellant, Massachusetts Bonding and Insurance Company, was the surety on Liebman's performance bond. (Tr. p. 4.)

The appellee (also referred to as plaintiff), California Electric Supply Company, was during all times herein mentioned engaged in the sale of electrical supplies.

In the process of the fulfillment of the public housing contract the defendant Liebman had several subcontractors, one of which was the Aetna Electric Company. During February, March and April, 1943, the plaintiff sold and delivered to the Aetna Electric Company to be used on the contract electrical supplies amounting to the sum of \$1438.52. The Aetna Electric Company encountered financial difficulties and was unable to pay this sum. (Tr. p. 32.) On May 24, 1943, the plaintiff, realizing the financial position of the Aetna Company, and proceeding under the provisions of the Miller Act (40 U.S.C.A., Sec. 270 (a), filed a statutory notice, "Notice to Withhold Payment" (Plaintiff's

Exhibit 11), on the defendant Leibman, his surety, and the United States Engineers. (Tr. p. 33.)

In August, 1943, the Aetna Electric Company, being unable to compromise its obligations, filed its petition in bankruptcy. (Tr. p. 37.)

Immediately, in the Aetna Electric bankruptcy matter, the plaintiff filed a claim against the estate of the bankrupt for the \$1438.52 supported by the "Notice to Withhold" that it had served on the defendants, contending that such claim by virtue of the Miller Act was a preferred claim in such Bankruptcy Court. A formal hearing was held on the claim in which the plaintiff California Electric Supply Company presented its case on the merits of the claimed preference and briefs were submitted. (Tr. p. 39.) Neither the defendant, nor his surety, appeared before the Bankruptcy Court. (Tr. p. 41.)

After briefs were filed, the referee in Bankruptcy refused to rule on the disputed priority of the claim on the ground that the question was moot since the fund was not then before the Court. (Tr. p. 39.)

The defendant Liebman, against whom the plaintiff and the trustee of the bankrupt Aetna had made claims, had been refusing to pay the \$1438.52 until there was an agreement between the rival claimants or an order of Court as to whom the money should be paid. (Tr. pp. 39, 17; Defendants' Exhibit 2A.) In an informal discussion of this dilemma between Mr. Mancuso, as attorney for the plaintiff, the trustee of bankrupt Aetna and the referee, it was decided that

Mr. Mancuso, as attorney for the plaintiff, should try to get the money paid to the trustee as a special fund since Liebman was willing to pay if he were properly protected. Mr. Mancuso was to call defendant Liebman's counsel and arrange the payment to the trustee as an "earmarked" fund under a stipulation to be signed by all parties and to represent to the defendant Liebman that by so voluntarily paying, he would avoid the necessity of a suit. (Tr. p. 40-41.)

Apparently confident of his legal position that his client's claim was a preferred one, and in order to avoid further effort in its collection, Mr. Mancuso, as attorney for the plaintiff, contacted Mr. Haughey, attorney for the defendant, and suggested that a stipulation be prepared and executed by all interested parties and that the \$1438.52 be paid to the trustee to be held by him pending a ruling by the Bankruptcy Court. (Tr. p. 42.) Testimony by Mr. Mancuso as to the intended purport of the proposed stipulation was stricken. (Tr. p. 42.)

Mr. Haughey testified that Mr. Mancuso called him by phone proposing that a stipulation be entered into between the California Electric Supply Company, the trustee of the bankrupt Aetna Electric Company, and Ben Liebman, providing that Liebman pay the sum to the trustee to be "earmarked" for further order of the Bankruptcy Court. (Tr. p. 53.)

While Mr. Mancuso did not recall that he prepared the stipulation (Tr. p. 48), Mr. Haughey's testimony (Tr. p. 54) and the contents of a letter from Mr.

Mancuso to Mr. Haughey enclosing the prepared stipulation (Defendants' Exhibit A3; Tr. p. 68; Tr. p. 49) conclusively show that Mr. Mancuso authored the stipulation and forwarded it to Mr. Haughey. Mr. Haughey forwarded the stipulation to his client, defendant Liebman, for execution and compliance. (Tr. p. 54.)

It was admitted that the stipulation was executed and the \$1438.52 was paid by defendant Liebman to the trustee of the bankrupt pursuant thereto. (Tr. p. 45.)

The defendants' defenses to this action are based upon the facts surrounding the conception of the stipulation, its legal effect, and Liebman's voluntary good faith compliance therewith. Because of its importance it is here set out in full:

#### “EXHIBIT ‘A’

“In the Southern Division of the United States District Court for the Northern District of California

“No. 35800-R-In Bankruptcy

“In the Matter of Aetna Electric Co., a corporation, Bankrupt.

#### “STIPULATION

“It is hereby stipulated by and between Ben Liebman, California Electric Supply Company, a corporation, and John O. England, as Trustee in Bankruptcy of the above bankrupt corporation, as follows:



## 1.

“That Ben Liebman is indebted to Aetna Electric Co., the above named bankrupt corporation in the sum of \$3230.67 and that California Electric Supply Company, a creditor of said bankrupt corporation, has filed its proof of claim in the sum of \$1438.52 to which said proof of claim is attached a copy of a Notice addressed to said Ben Liebman to withhold payment of said amount owing by him to the bankrupt corporation being a portion of his total indebtedness of \$3230.67.

## 2.

“That John O. England, as Trustee, has made demand upon Ben Liebman for the payment of said sum of \$3230.67 and the said Ben Liebman has refrained from making payment of \$1438.52 of said amount upon advice of his counsel on account of said Notice of California Electric Supply Company, a corporation, to withhold referred to in the preceding paragraph.

## 3.

“That California Electric Supply Company, a corporation, consents that said sum of \$1438.52 be paid by Ben Liebman to John O. England, as Trustee in Bankruptcy, providing he agrees to hold said entire sum until the further Order of the above entitled Court.

## 4.

“That John O. England, as Trustee in Bankruptcy, agrees with Ben Liebman and California Electric Supply Company, a corporation, to accept the sum of \$1438.52 from Ben Liebman and

to hold the entire amount until the further Order of the above entitled Court.

“Dated this 29th day of December, 1943.

“B. Liebman  
*California Electric Supply  
 Company, a corporation,*  
 By Edward T. Mancuso  
 Its Attorney

John O. England  
 Trustee of the bankrupt  
 Estate of Aetna Electric  
 Co., a corporation.”

Subsequently, the Bankruptcy Court ruled that the plaintiff's claim to the “earmarked” \$1438.52 was not a preferred one, and on appeal the Federal District Court affirmed the Referee. (Tr. p. 43.) Neither of the defendants was present at either hearing and did not participate therein. (Tr. p. 43.)

After the adverse ruling of the Bankruptcy Court, and spurning its rights as a common creditor in the Aetna Electric Company bankrupt estate where it would have realized but twenty-five cents on the dollar on its claim (Tr. p. 44), this suit was then filed by plaintiff to require the defendant Liebman to pay the \$1438.52 a second time.

**SPECIFICATION OF ERRORS.**

1. The District Court erred in granting judgment for the plaintiff;
2. The District Court erred in ruling that the written stipulation entered into between the plaintiff and the defendant Liebman and the trustee in bankruptcy did not release the defendant Liebman and his surety Massachusetts Bonding and Insurance Company from the obligation sued upon;
3. The District Court erred in ruling that the Miller Act (40 U.S.C.A. 270(b)) is a special suretyship right;
4. The District Court erred in holding that the written stipulation entered into between the plaintiff and the defendant Liebman and the Trustee in Bankruptcy did not constitute a waiver by the plaintiff of its rights under the Miller Act (40 U.S.C.A. 270(b));
5. The District Court erred in ruling that upon the facts and the law plaintiff had shown a right to recovery;
6. The District Court erred in failing to hold that the defendants had previously paid the alleged indebtedness sued upon;
7. The District Court erred in not holding that the defendants had, prior to this suit, extinguished the obligations imposed upon them by the Miller Act, by defendant Liebman's good faith compliance with the terms of the stipulation;
8. The District Court erred in failing to hold that the plaintiff by instigating and participating in the

stipulation waived its rights under the Miller Act and was estopped from seeking its benefits;

9. The District Court erred in its findings of fact and conclusions of law in holding that the Stipulation did not constitute (a) a receipt of payment and satisfaction; (b) a waiver of rights under the Miller Act; (c) a release; and (d) an equitable estoppel.

---

### **SUMMARY OF ARGUMENT.**

#### **A.**

The Circuit Court of Appeals is not here obliged to accept the findings of fact and conclusions of law of the trial Court. No advantage was had by the trial Court in hearing and seeing the witnesses as all material facts are uncontroverted. The effect of the written stipulation when considered with the conduct of the parties was the only issue before the trial Court and such Court clearly erred in the construction it placed thereon. It is the duty of this Court to reverse the judgment as a matter of law.

#### **B.**

The defendant Liebman, by complying with the terms of the stipulation and by paying the sum demanded to the trustee of the bankrupt Aetna Electric as directed by the plaintiff, fully extinguished the obligation.



## C.

Defendant Liebman had informed the plaintiff and the trustee of the bankrupt Aetna Electric Company that he would pay the \$1438.52 when he was advised as to how it should be paid and which one of them was entitled to payment. The plaintiff by urging that defendant Liebman execute a stipulation prepared by it; by procuring payment by defendant Liebman of the \$1438.52 to the trustee according to the terms of the stipulation; by expressly consenting to such a mode of payment; and by creating the impression upon defendant Liebman that his good faith compliance with the terms of the stipulation would result in full satisfaction of the claim—is such conduct as will create an equitable estoppel, and the plaintiff is and should be in equity and good conscience estopped from maintaining this suit to mulct payment from the defendant a second time. That such acts of the plaintiff constitute a waiver of the benefits of the Miller Act.

## D.

The stipulation was in law and fact a receipt and release of all claims the plaintiff had against the defendants, and a waiver of rights under the Miller Act. The document, though termed a “stipulation”, and whether it be deemed cleverly or ineptly drawn, represented the intent of the parties to adjust all differences. It is immaterial that specific words of release and payment were not used in the agreement, since the interest of the parties was manifest.

## E.

Plaintiff's "Notice to Withhold", a statutory prerequisite under the Miller Act, effectively prevented defendant Liebman from paying the amount claimed to anyone unless consent was obtained from the plaintiff. By the terms of the stipulation that consent was granted. The statutory notice was therefore in effect withdrawn or waived. Since there was no subsequent statutory notice filed and nothing done to revitalize the only notice, the jurisdictional prerequisites of the statute were not complied with and this suit must fail.

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**ARGUMENT.**

## A.

The appellants are aware of the consideration justly placed on the findings of a trial Court by an appellate tribunal. This is a proper rule as it is based upon the fundamental principle that a Court which sees and hears witnesses is in a better position to decide disputed questions of fact.

In the instant case no such advantage was had by the trial Court as there was no material dispute of the facts. There was some variance in the recollection of the lawyer witnesses as to the conversation had prior to the execution of the written instrument. But this discrepancy was eliminated by the action of the trial Court in striking such testimony from the record. (Tr. p. 42.)

Therefore, this Court is in the identical position of the trial Court in passing upon the merits of the case. The effect of the written stipulation when viewed in the light of the conduct, actions and deeds of the parties as disclosed by the evidence, is controlling. Under the circumstances the trial Court's opinion and its findings of fact and conclusions of law can only be advisory, and this Court is not compelled to be persuaded thereby.

In

*Equitable Life Assurance Society v. Irelan*, 123  
Fed. (2d) 462,

this Court considered a case involving the liability of an insurance company where the issue was whether the insured died from accident and stated the rule as to the effect to be given a trial Court's findings where the case was tried by deposition and no opportunity afforded the trial Court in hearing and seeing the witnesses.

at 464:

"Since all testimony bearing on the circumstances antecedent to and surrounding her death was by deposition, the finding of accidental death, while justly entitled to consideration, has not the weight we would otherwise be obliged to concede to it. This court is in as good a position as the trial court was to appraise the evidence and we have the burden of doing that. Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, was intended to accord with the decisions on the scope of the review in federal equity practice; and, as is well known, in the federal courts where

the testimony in equity or admiralty cases is by deposition the reviewing court gives slight weight to the findings.”

In

*Smith v. Royal Ins. Co., Ltd.*, 125 F. (2d) 222,

the Court, in considering a case where the material facts presented were of a documentary character, stated at page 224:

“The bulk of the evidence bearing on the subject is of a documentary nature or rests on circumstances concerning which there is no dispute. Accordingly the finding of falsity does not command the strong presumption of verity which usually attends a finding. *Equitable Life Assur. Soc. v. Irelan*, 9 Cir., 123 F. 2d 462.”

In

*In re Chicago & N.W.R. Co.*, 110 F. (2d) 425,

at 427 the Court said:

“In the instant case the bulk of the record stands on documentary evidence. Although some oral evidence was adduced, it is not conflicting nor does it present a question of credibility of the storyteller. The facts are not in dispute, and in such situations the legal deductions and conclusions of law drawn by the District Court, while worthy of great consideration, are not binding on this court. Nor are the findings conclusive on this court, unless supported by substantial evidence. See Rule 52(a), Federal Rules of Civil Procedure, 28 U.S. C.A., following Sec. 723c.”



In

*United States v. South Georgia Ry. Co.*, 107 F.  
(2d) 3,

the Court was considering the merits of a suit for income tax where the issue was as to whether certain payments made under preferred stock certificates were to be considered as dividends or as payments of interest. At page 3 the Court stated as follows:

“A copy of one of the certificates, the resolution authorizing their issuance and what has been done, since their issuance, with and in regard to them, appears in the evidence without contradiction or dispute. The case then is not one for the weighing of evidence, and the resolution of testimonial differences, and in which, therefore, we must take the facts as the District Judge has found them, but one for the determination by us of the legal effect of the facts as the record presents them, clearly, simply and without controversy.”

Appellants therefore respectfully submit that because of the uncontroverted character of the evidence as here presented the findings of fact and conclusions of law of the trial Court are here only advisory.

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## B.

Long prior to the bringing of this suit the plaintiff had served a “Notice to Withhold Payment” on the defendants as required by the Miller Act, stating that defendant Liebman’s subcontractor, Aetna Electric Company, owed it \$1438.52. (Tr. p. 34.) Plaintiff then

filed a claim as a preferred creditor in the estate of the bankrupt Aetna Electric Company and litigated it. (Tr. p. 37.) Defendant Liebman admitting the amount of \$1438.52 was due and unpaid, refused to pay the sum until he knew the party entitled thereto, or was authorized so to do by agreement between the parties or an order of Court. (Tr. pp. 39, 17.) When the bankruptcy referee refused to rule on the question of preference because the fund was not before him, plaintiff, through its attorney, undertook to get defendant Liebman to pay. (Tr. pp. 40-53.) The plaintiff, confident in the thought that it would be held a preferred creditor in the bankrupt estate, arranged for and prepared the stipulation, and directed the defendant Liebman to execute it and comply with its terms. (Tr. pp. 48, 53, 57.) Defendant Liebman, in good faith complied with the provisions of the stipulation and with a bona fide purpose of satisfying the obligation, paid the \$1438.52 to the trustee in bankruptcy to be held "earmarked" pending order of the Court on the preferred claim. (Tr. p. 45.)

The fact that the plaintiff did not receive the entire \$1438.52, but instead was declared only a general creditor entitled to share at the rate of about twenty-five cents on the dollar, is beside the point. (Tr. p. 44.) Defendant Liebman had done what was agreed upon by the rival claimants to the fund and had performed as he had been directed to do by the plaintiff. By so doing he fully extinguished the obligation. The California Civil Code states this fundamental proposition of law very succinctly.

Section 1476, *California Civil Code*, provides:

*“Effect of Direction by Creditors.* If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance.”

See also:

20 *Cal. Jur.* 909;

8 *Cal. Jur.* 1054.

It can be argued with equal force that payment to the trustee under the stipulation was a payment to the plaintiff's agent and that agency to accept the money was specifically created by the terms of the stipulation. It must follow on this ground that the obligation was fully satisfied.

“It can hardly be questioned that when a principal appoints an agent and authorizes him to receive money for and on behalf of the principal, that payment has been made to the principal as a matter of law when made to an agent.”

*O. A. Graybeal Co. v. Cook*, 111 Cal. App. 518 at 530, 295 P. 1088.

See also:

*Burgess v. Security First Nat'l Bank*, 44 Cal. App. 808 at 819, 113 P. (2d) 298;

20 *Cal. Jur.* 903.

## C.

Whether the stipulation be considered a receipt, a release or a waiver is here immaterial. The plaintiff's acts in the preparation of the stipulation and its conduct in securing its execution and compliance misled the defendant to his prejudice and plaintiff is now estopped from asserting further claim.

The defendant had been refusing to pay until there was an agreement between the rival claimants or an appropriate order of Court. (Tr. p. 39.) The plaintiff in representing that the stipulation prepared by it was a proper, expeditious and satisfactory mode of payment procured such payment by the defendant. (Tr. pp. 53-54.) The plaintiff by taking such position which caused defendant Liebman to move to his detriment is now precluded from taking the contrary stand that plaintiff was at all times reserving his rights under the Miller (Heard) Act.

## In

*Kansas City Marble & Tile Co. v. Penker Construction Co.*, 86 Fed. (2d) 287,

the Court considered a suit under the Miller (Heard) Act, where to induce payment to a subcontractor by the general contractor, a materialman executed a "complete waiver of lien". After the payment to the subcontractor, the materialman did not get his share thereof and brought suit contending that the waiver was intended to apply to liens on the building and not a recovery under the statute. The Court, in denying a recovery stated at page 288:



“And we agree with the judge below that petitioner is estopped from asserting a claim against the bond for the materials furnished, since it is clear that petitioner intended by the execution of the waiver to assure the general contractor that petitioner would assert no claim against him for materials furnished and that the general contractor was thereby induced to make settlement with the subcontractor. All parties understood that payments would not be made to the subcontractor so long as claims for materials furnished him might be asserted against the bond; and the waiver was executed by petitioner to be used by the subcontractor in obtaining such payments.”

In

*United States for Use and Benefit of Noland Co. v. Wood*, 99 Fed. (2d) 80,

the Court considered a case almost identical in principle to the case at bar. The materialman plaintiff induced a defendant general contractor to employ a subcontractor who was indebted to the plaintiff and a three-party agreement was entered into. By the agreement the materialman was to furnish materials to the subcontractor; the general contractor was to supervise the subcontractor's payrolls and advance only those sums necessary to meet them and was to hold what remained for the materialman. There was but little profit in the job, and at the completion the general contractor did not have enough money owing the subcontractor to pay for the materials furnished by the materialman. The materialman brought suit under the Miller (Heard) Act. The general contractor de-

fendant admitted indebtedness to the extent of the moneys held pursuant to the agreement. The Court in denying recovery under the statute said at pages 82 and 83:

“Without deciding the question whether the three-way agreement constitutes a waiver of plaintiff’s rights under the Heard Act, we are of the opinion that under the agreement the plaintiff is estopped from claiming any rights other than those given by the contract, which the defendant has complied with.

“The doctrine of equitable estoppel is universally recognized by the courts. This doctrine can be applied in actions under the Heard Act. *U. S. v. American Bonding & Trust Company*, 4 Cir., 89 F. 925, cited with approval in *United States Fidelity & Guaranty Company v. United States*, 191 U. S. 416, 24 S. Ct. 142, 48 L. Ed. 242. *To establish equitable estoppel it is not necessary that actual fraud be shown. It is only necessary to show that the person estopped, by his statements or conduct, mislead another to his prejudice.*

\* \* \* \* \*

“Parties inducing another to act on reasonable belief that they have waived or will waive certain rights will be estopped to insist on them to his prejudice. *Big Vein Pocahontas Coal Company v. Browning*, 137 Va. 34, 120 S. E. 247. And estoppel may be prejudiced on representations not made with fraudulent intent, if they are of such a character as to induce a reasonably prudent man to believe that they were intended to be acted upon. *American Mutual Liability Ins. Company v. Hamilton*, 145 Va. 391, 135 S. E. 21; *Richmond Trust Company v. Christian*, 150 Va. 244, 142 S. E. 528.

“\* \* \* Here the defendant had every reason to believe that the plaintiff would abide by the terms of the three-party agreement \* \* \*.

“The fact that the contract here in question resulted in a loss to the subcontractor does not change the situation and the plaintiff is estopped from claiming any benefit other than that accruing to it under the three-way contract.” (*Italics ours.*)

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#### D.

The stipulation here was intended by the parties to have been a release and receipt showing payment of the obligation and a waiver of further claims against the defendant. The fact that no such specific words were used or that the document was termed a “Stipulation” is not controlling.

“The agreement of the parties to the instrument that it should be characterized as a ‘lease’ cannot change its true character. The evident intent and purpose of the parties as disclosed by the terms of the instrument control.”

*Mahoney v. San Francisco*, 201 Cal. 248 at 258.

The Court below in finding for the plaintiff was apparently impressed by the failure of the stipulation to contain the express words “release” or “waiver”. (Tr. p. 58.) The conduct of the plaintiff in conceiving of the plan or mode of payment by the defendant, in preparing the document, in inducing the defendant to execute it and pay thereunder and its efforts to reach the specific fund so paid through the Bankruptcy

Court was not discussed by the Court in its opinion. (Tr. pp. 58, 59, 60.) The litigants are in the dark as to whether such facts were or were not considered by the Court as constituting an estoppel or when considered with the document amounted to a waiver. The Court held that the Miller Act created such a special suretyship right that it could only be waived or discharged by express language. The Court did state that defendant Liebman expected that by paying under the stipulation he was extinguishing the obligation, but since there was no specific language to that effect his hopes and expectations were not warranted. It is believed that the Court in deciding the case looked solely to the written document for guidance and omitted to consider that acts and conduct of the parties might or should bear on its interpretation. It is felt that such a strict and narrow basis for decision is not here justifiable.

“The intent of the parties to a contract is not to be determined by the ‘label’ of the agreement, but rather is to be gathered by considering all the acts, statements and writings which go to make up the contract.”

*Bekins v. Lindsay-Strathmore Irrigation Dist.*,  
114 Fed. (2d) 680 at 683.

Defendant Liebman was ready and willing to pay the liquidated sum of \$1438.52 to whichever of the rival claimants to the fund was entitled to it. Both had made claims against him. (Tr. p. 39.) He refused to pay until there was an agreement between the parties or an appropriate order of a Court. He could



gain nothing by voluntarily paying the money, except the gratitude of a creditor who got its money with little effort.

In their efforts to assert their rights to the fund, the trustee of the bankrupt Aetna and the plaintiff had reached an impasse. The referee in bankruptcy would not rule on their divergent contentions until the fund was before the Court. It was necessary to get the fund before the Court if either was to prevail before the bankruptcy tribunal, and apparently both thought such a means of litigation would be preferable to a suit at law under the Miller Act. Apparently the plaintiff was more confident of its position as it induced the defendant to pay the money in order to avoid a suit.

The plaintiff prepared the agreement. (Tr. p. 68, Def. Exhibit A-3.) The defendant was to pay the money to the trustee. The trustee was to hold the fund separately "earmarked" so that it would immediately be available to the plaintiff if it prevailed on its claim for preference. The Court was to rule on the litigation. Everything was planned and set up to forever end the controversy.

Since the plaintiff prepared the stipulation, the words thereof must be construed most strongly against it.

"In California, the words of a contract will be taken most strongly against the party who employs them. Sec. 1654, Civil Code of California."

*Flotation Systems v. U. S. for Use of Pollia*,  
136 Fed. (2d) 483 at 484.

See also:

*Payne v. Newal*, 155 Cal. 46, 99 P. 476.

It is significant that the plaintiff, if it desired to reserve its rights under the Miller Act, did not embody such a simple statement in the stipulation. Good faith on the part of the author of the instrument must be assumed, for to do otherwise one would have to assume that an unscrupulous preparer of the instrument cleverly omitted such a provision so that the stipulation could be foisted upon the unsuspecting defendant. Certainly, an attorney would never advise a client in the defendant's position to voluntarily pay a sum of money under an agreement where strings were attached when to refuse to pay could not possibly injure such client. It is unthinkable that plaintiff's attorney deliberately set a trap for the defendant in the preparation of an instrument which would mean one thing when compliance was induced and another after the money was paid and the plaintiff frustrated in getting it.

The defendant relied on the stipulation so prepared by the plaintiff and which purported to represent the intention of the parties to fully end the controversy and paid his money. Under such circumstances any ambiguity or omissions in the instrument should be resolved in favor of the defendant.

“A party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to himself.”

*Noonan v. Bradley*, 76 U. S. 394, 19 L. Ed. 757 at 761.

In

*Kansas City Marble & Tile Co. v. Penker Const. Co., supra,*

the executed waiver did not expressly waive a claim under the Miller Act, yet the Court found that the conduct and actions of the parties were sufficient to raise an equitable estoppel.

In

*United States for Use and Benefit of Noland Co. v. Wood, supra,*

the three-way agreement made no mention of waiver or release, yet the Court, without passing on the question whether there was in law a waiver of rights under the Miller Act, found that under all the facts an equitable estoppel would arise.

It is earnestly submitted that all the circumstances indicate that the parties intended and construed the stipulation to mean that it was a release and a waiver as to defendant Liebman, and all acted under such interpretation.

The plaintiff's own interpretation of the stipulation as is indicated by its subsequent course of conduct is highly significant. After the money was paid it resumed its litigation in the forum of its choosing, i.e., the Bankruptcy Court, where it reasserted its priority claim to the fund. (Tr. p. 43.) The Bankruptcy Court rejected the plaintiff's contention for priority, and thereupon the plaintiff appealed from such decision to "Court of Appeals" (apparently District Court intended). (Tr. p. 43.) It was not until the plaintiff's

position was held untenable on appeal that it instituted this suit. (Tr. p. 9.) The plaintiff's tenacity and persistence in its efforts to reach the fund irresistibly impels the conclusion that until its frustration in the Bankruptcy Court it interpreted the stipulation as being a full and complete release of claims against the defendants.

Construing the stipulation most favorably to defendant since the plaintiff was the author of it with all the facts and circumstances, a release and waiver should be implied from its terms.

---

### E.

In order for the plaintiff to maintain this suit it must allege and prove an appropriate notice of the unpaid indebtedness was duly served on the defendant and the defendant's surety within ninety days after the material or labor was furnished.

Title 40, Section 270(b), *U.S.C.A.* (Miller or Heard Act).

The serving of such a notice is a jurisdictional prerequisite to the bringing of the action, and failure to allege and prove such a notice is fatal to sustaining the action.

*U. S. for the Use and Benefit of John A. Denie's Sons Co. v. Bass et al.*, 111 Fed. (2d) 965;  
*U. S. ex rel. Texas Portland Cement Co. v. McCord*, 233 U. S. 157, 34 S. Ct. 550, 552, 58 L. Ed. 893.



The plaintiff served such a notice (Tr. p. 65; Plaintiff's Exhibit 11) on May 24, 1943. The defendant complied with such notice and withheld payment of the money claimed to be due until December 29, 1943, when he was authorized and directed by the plaintiff by the terms of the stipulation to pay the specific money so held to the trustee in bankruptcy of the Aetna Electric Company.

By so authorizing the release of the fund the plaintiff either withdrew or waived the effectiveness of the notice in the same manner that one who has a possessory lien loses that lien when he yields possession of the property held. The notice therefore no longer had vitality or legal force.

The instant suit was filed and bottomed upon the only statutory notice given, and without any attempt to serve an additional notice or to revitalize the old one. The suit must therefore fail because of the absence of this jurisdictional prerequisite.

**CONCLUSION.**

To hold that the defendant must twice pay this debt would be to penalize persons who, in good faith, have relied on the representations of their fellow man and have attempted to honestly settle their differences.

“It ought to be and is the object of Courts to prevent the payment of any debt twice over.”

*Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U. S. 183 at 189, 61 S. Ct. 840, 85 L. Ed. 725;

*Harris v. Balk*, 198 U. S. 215 at 226, 25 S. Ct. 625 at 628, 49 L. Ed. 1023.

Dated, San Francisco, California,  
November 19, 1945.

Respectfully submitted,

JOSEPH C. HAUGHEY,

*Attorney for Appellants.*



No. 11,102

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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BEN LIEBMAN, also known as B. Liebman,  
MASSACHUSETTS BONDING AND INSURANCE  
COMPANY (a corporation),

*Appellants,*

vs.

UNITED STATES OF AMERICA for the use  
and benefit of California Electric Sup-  
ply Company (a corporation),

*Appellee.*

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Upon Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.

Appellee's Brief on Appeal

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United States  
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Upon Appeal from the District Court of the United States for the  
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Appellee's Brief on Appeal

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CORRECTED STATEMENT OF FACTS

While it is not the intention of appellee, California Electric Supply Company, to discredit the honesty of purpose of appellant herein in stating the facts set forth in his brief on appeal, which on the whole fail to conform



not from commission, but rather omission, we feel it incumbent to point out the following errors and corrections.

On page 4 of appellant's brief on appeal, appellant refers to Liebman's performance bond; this, in fact, was a payment bond. (Tr. 7)

On page 4 of the brief appellant refers to the filing of a "Notice to Withhold Payment," but neglects to add "and Verified Claim" as appears from plaintiff's "Exhibit 11." (Tr. p. 65)

On page 5 of appellant's brief again service of a "Notice to Withhold" is mentioned, but again appellant neglects to mention "Verified Claim." As appears from plaintiff's "Exhibit 11" (Tr. p. 65) the two are part and parcel of the same document.

Then on page 6 of appellant's brief, appellant's statement, "Apparently confident of his legal position that his client's claim was a preferred one, and in order to avoid further effort in its collection," is obviously a conclusion and finds no validity in a statement of facts.

To clarify the second paragraph on page 5 of appellant's brief, it should be added that, "the referee in bankruptcy ruled that Ben Liebman did owe the estate of Aetna Electric Company, bankrupt." (Tr. p. 45)

With reference to paragraph 3, page 9 of appellant's brief, in fairness to appellee it should be added, "that at the same time of the appeal from the referee's ruling to the Federal District Court, and simultaneously therewith, this present suit was filed."

With these few proposed corrections, the statement of facts meets with appellee's approval.

## SUMMARY OF ARGUMENT

That appellee has performed all acts and has done all things required by the Miller Act to sustain its claim and this action.

That there can be no estoppel or waiver of appellee's rights without a clear showing by appellant of injury, deception, fraud, gain or prejudicial change of position, and failing this, there is only one conclusion possible—the judgment of the District Court should be sustained—appellee's right to recovery of *payment in full*, as guaranteed in the Miller Act, should be approved.

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## ARGUMENT

Appellee, California Electric Supply Company, having filed and served its verified claim on appellants (Tr. pp. 33 and 34) within the time limitation as provided by the Miller Act, Title 40, Chapter 3, United States Code Annotated, Sec. 270 B, providing that a materialman, the relationship of appellee, who has not been paid *in full* (Miller Act, Sec. 270 B) for materials furnished or labor supplied, shall have the right to sue on the *payment bond*, furnished on said government contract, for the balance unpaid at the time of institution of suit.

Plaintiff's and appellee's rights to sue on the payment bond having been perfected by meeting all of the requirements and specifications of the Miller Act, to-wit:

Appellee not having received payment *in full* within ninety days of the furnishing of the last materials on the public housing project (Tr. p. 32); and

Appellee having caused to be served within the ninety day period, a verified claim of money due, on appellants. (Tr. p. 35)

The legal and inevitable conclusion of this action in the District Court was judgment for appellee and against appellants, Jeannette Liebman, administratrix of the estate of Ben Liebman, also known as B. Leibman, Deceased, and the Massachusetts Bonding and Insurance Company, jointly and severally, for the full amount owing to appellee, the sum of \$1,438.52 (Tr. p. 21), to be reduced by amounts received from bankrupt estate of Aetna Electric Company.

Appellant apparently does not seriously contend that appellee's rights are not clearly within the provisions of the Miller Act. True, appellants do in Paragraphs "B" and "E" of their brief, pages 16 and 27, devote some time and space to a discussion of a "Notice to Withhold," a futility which a closer reading of the Miller Act would correct. Under the Miller Act a "claim" is the only notice the contractor is entitled to and the materialman required to give.

Unless some new factor such as estoppel or waiver exists as contended by appellants by reason of the stipulation (Tr. p. 16) the judgment of the District Court seems inescapable.

The generally recognized elements of estoppel are succinctly set forth in American Jurisprudence, Vol. 19, Sec. 42 at p. 640. They are as follows:

"1. Conduct of the party to be estopped which amounts to a false representation or concealment of material facts.

2. Expectation that such conduct shall be acted upon by the other party.

3. Knowledge, actual or constructive, of the real facts."

And on the part of the party claiming the estoppel:

"1. Lack of knowledge and of means of knowledge of the truth as to the facts in question.

2. Reliance on the conduct of the party estopped.

3. Action based thereon of such a character as to change his position prejudicially."

And in Section 43 of the same chapter, book and volume, it is stated:

"The doctrine of estoppel in pais must be applied strictly and should not be applied unless substantiated in every particular."

Applying this yardstick to the relationship and dealings of appellant and appellee, we are forced to the conclusion that none of these elements are present.

Appellant was as conversant with the facts as was the appellee, and there was never any attempt on appellee's part to conceal anything. Appellant at all times had the advice and counsel of an attorney. (Tr. p. 55) The meaning, terms and legal effect of the stipulation are clear and unambiguous, and the duties imposed therein are clear cut and unequivocal—no advantage was attempted, nor was any gained.

Appellant, Ben Liebman, did not change his position prejudicially by reason thereof; he was at all times legally bound to pay the money into the bankruptcy court, and by so doing he avoided the expenses and annoyance of a suit. (Tr. p. 40).



In the case of *Barnett v. Kemp*, 258 Mo. 139, the court therein, in considering a similar situation, stated as follows:

“Estoppel cannot be based upon representations which tend only to induce a party to do some act which he is already legally bound to do.”

And again, in the case of *United States v. Dunn*, 268 U.S. 121, and also in the case of *Hammond v. Tate*, 83 Fed.(2nd) 69, this rule was stated:

“There can be no estoppel where there is no loss or injury, damage or prejudice to the party claiming it.”

Appellant's discussion of the effect of the “Notice to Withhold” in paragraphs “B” and “E”, pages 16 and 27 of his brief, finds absolutely no legal justification.

The Miller Act does not require or provide for a “Notice to Withhold” and the effect of such a notice was an absolute nullity. Appellant by reason thereof cannot claim deception; he is presumed to know the law and had the advice of attorneys at all times. The “Notice to Withhold” neither required appellants to act or prohibited them from acting in any way they saw fit.

The terms of the stipulation are clear and unequivocal and cannot be changed by interpretation or conjecture. There is no need for extraneous factors to aid in interpretation; nothing needs to be resorted to other than the document itself for the purpose of clarity.

In Vol. 25 A.L.R. 179, a host of authorities are cited in support of the rule that “estoppels are never based upon conjecture.”

In the present case the appellant would have the appellee estopped from enforcing a statutory right and privilege by stipulation, which document did not even name or refer to that obligation. The only one referred to is the one existing between Aetna Electric Company and Ben Liebman. (Tr. p. 17) We agree that the acts and things done pursuant to said stipulation did satisfy the Aetna Electric Company's claim, but this had nothing to do with the legal obligation as provided by the Miller Act to insure payment *in full* to appellee, a materialman. Appellee's conduct at no time ever deceived the appellant, nor did its proceedings before the Bankruptcy Court in the Aetna bankruptcy estop it from proceeding under the bond.

The principal "that a materialman may prove his claim in the bankruptcy of either the contractor or subcontractor, and in no wise be precluded from proceeding under the payment bond" has been established and followed in these cases:

*U. S. for use and benefit of the United States Rubber Co. v. Ambursen Dam Co.*, 3 Fed. Supp. 548;

*Title Guaranty & Supply Co. v. United States to use of General Electric Co.*, 187 Fed. 98;

*United States for use and benefit of John Davis v. Illinois Surety Co.*, 226 Fed. 653.

Courts have long ago established, supported and followed the principal that, estoppel always presupposes error on one side and fault or fraud upon the other, of which it would be inequitable for one party to take advantage.

*Morgan v. Chicago A. R. Co.*, 96 U.S. 716.

In the principal case we have no error, advantage, fraud, fault or deception.

In the case of *Carpy v. James Dowdell, et al.*, 115 Cal. 677, the principal was enunciated, "where both parties have knowledge of all the facts, there can be no estoppel."

In the present case there is some confusion as to who drew the stipulation (Tr. pp. 48 and 57) and while not important, it has been stressed by appellant, and for that reason deserves consideration. It must be assumed that appellant, Ben Liebman, knew his legal duties. He knew that by turning over the money to the bankruptcy court he alone benefited by saving himself the expense and annoyance of a suit that was bound to be adverse. While the stipulation did fail to provide for everything he desired, i.e., a receipt, estoppel and waiver, as is now claimed for it, he was in no position to bargain for anything more. Appellee had nothing to gain or lose other than the desire to bring proceedings to a climax—to waive anything would be a voluntary gift.

Appellee spared neither time nor expense in attempting to perfect his claim of priority before the Bankruptcy Court, the success of which certainly would have redounded to appellant's benefit. Success did not attend appellee's efforts in the bankruptcy court; the legal effect of that decision was to relegate it to the present proceedings under the Miller Act. Certainly the appellant cannot now be heard to say that appellee was guilty of lack of good faith, abuse of confidence or deception.

Appellants in paragraph "C" of their brief, have spread their liand on the table, so to speak, and figuratively propose that some one else pick out the cards that will

win for them. Answering becomes at once onerous and laborious.

I think we can admit that the stipulation is a receipt. We never have denied, and do not now deny, that the Trustee in Bankruptcy received the \$1,438.52. Perhaps of all the things claimed for it, the stipulation is, in the final analysis, only a receipt for the money paid to the Trustee.

Waiver, being a more common defensive maneuver, is probably deserving of more specific treatment. Being a defensive last resort, so to speak, the courts have adopted clearly defined rules, the cardinal one of which is as follows:

“To make a case of waiver of a legal right there must be a clear, unequivocal and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part. A waiver to be operative must be supported by an agreement founded on a valuable consideration.”

*United Fireman's Ins. Co. v. Thomas*, 82 Fed. 406.

As we have seen, no vestige of benefit or profit ever accrued to appellee from appellant.

“The burden is upon the party claiming a waiver to prove it by such evidence as does not leave the matter doubtful or uncertain.”

*Aronson v. Frankfort Accident and Plate Glass Ins. Co.*, 9 Cal. App. 473.

In the following California case the Supreme Court stated the principal very cryptically. It said:

“Waiver is the intentional relinquishment of a known right after knowledge of the facts and always rests upon intent.”

*Wienke v. Smith*, 179 Cal. 220.



In the principal case neither appellee's conduct or the written stipulation, directly or indirectly, either waived, or estopped it from the present proceedings under the Miller Act.

The courts have established the rule that Title 40, Chapter 3, United States Code Annotated, Sec. 270 B, is highly remedial and should be construed liberally, and technical rules otherwise protecting sureties from liability are not applied in proceedings under said section.

*U. S. for use and benefit of Jones Contracting Co.  
v. Skilken*, 53 Fed. Supp. 14.

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#### CONCLUSION

All of the acts and things done, steps taken by appellee throughout the extended negotiations, and subsequent legal proceedings, respecting this claim for \$1,438.52, were made necessary in order that appellee protect and secure his right to *payment in full* guaranteed it under the Miller Act. That right to *payment in full* still exists, there never having been any satisfaction, nor estoppel to enforce it, or waiver of it, either directly, indirectly, by inference or construction. The stipulation is silent upon the rights guaranteed under the Miller Act. No fair, unbiased interpretation of its clear unambiguous terms could preclude appellee from an insistence of his rights under said act. The Miller Act, or any waiver of rights secured thereby, was never discussed in connection with the stipulation (Tr. p. 55), and no inference can be assumed.

There being present no estoppel, waiver or satisfaction of the rights secured by the Miller Act, appellee respect-

fully submits that the judgment of the District Court should be sustained. Appellee is not requesting that his debt be paid twice as appellant contends, but rather that it be paid *in full* as the law in such instances guarantees.

Dated, San Francisco, California,

December 20, 1945.

Respectfully submitted,

EDWARD T. MANCUSO,

LESLIE M. JULIAN,

*Attorneys for Appellee.*



No. 11,102

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

---

BEN LIEBMAN, also known as B. Liebman,  
MASSACHUSETTS BONDING AND INSURANCE  
COMPANY (a corporation),

*Appellants,*

VS.

UNITED STATES OF AMERICA for the use and  
benefit of California Electric Supply  
Company (a corporation),

*Appellee.*

---

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

---

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FILED

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PAUL P. O'BRIEN





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No. 11,102

IN THE

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For the Ninth Circuit

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BEN LIEBMAN, also known as B. Liebman,  
MASSACHUSETTS BONDING AND INSURANCE  
COMPANY (a corporation),

*Appellants,*

VS.

UNITED STATES OF AMERICA for the use and  
benefit of California Electric Supply  
Company (a corporation),

*Appellee.*

---

Upon Appeal from the District Court of the United States for  
the Northern District of California, Southern Division.

## APPELLANTS' REPLY BRIEF.

---

THE CASES CITED BY APPELLEE CONTAIN ONLY GENERAL  
EXPRESSIONS OF LAW AND IN NO MANNER ATTEMPT  
TO REFUTE THE ARGUMENTS ADVANCED BY APPEL-  
LANTS IN THEIR OPENING BRIEF.

In our opening brief we contended in argument "B"  
(pp. 11, 16-18) that defendant Liebman by complying  
with the terms of the stipulation and by paying  
\$1438.52 to the trustee in bankruptcy as directed by  
plaintiff, fully extinguished his obligation to plaintiff.



This argument was supported by pertinent legal citations at page 18 of our opening brief. No attempt has been made by appellee in its reply brief to show that these citations are inapplicable or without merit. A reply to the language of California Civil Code Section 1476 has been studiously avoided for the reason that under the facts of this case Liebman, having paid the debt due his creditor (appellee herein) in the manner directed by appellee, extinguished his obligation. The language of Civil Code Section 1476 and the other authorities in our argument "B" is so controlling in the instant case it is easily understandable why the appellee's reply consisted merely of a reference thereto at page 6 of its reply brief to the effect that our argument "finds absolutely no legal justification". Such a reply, in our opinion, is in effect an implied admission that argument "B" cannot be answered.

---

**APPELLEE HAS FAILED TO MEET APPELLANTS' CONTENTION THAT APPELLEE'S ACTS IN THE PREPARATION OF THE STIPULATION AND ITS CONDUCT IN SECURING ITS EXECUTION AND COMPLIANCE MISLED THE APPELLANTS TO THEIR PREJUDICE AND THAT SUCH ACTS AND CONDUCT HAVE CREATED AN ESTOPPEL.**

We contended in argument "C" of our opening brief (pp. 12, 19-22) that the acts and conduct of appellee in urging Liebman to execute the stipulation and pay the "earmarked" \$1438.52 to the trustee created an equitable estoppel and a waiver of the benefits of the Miller Act. Appellee's reply to these contentions starts at page 4 of its brief on appeal.

We concede that the generally recognized elements of estoppel are as set forth at pages 4 and 5 of appellee's brief on appeal. However, we cannot agree with its argument at the bottom of page 5, first, that Liebman "did not change his position prejudicially to himself by paying the money over to the Bankruptcy Court"; second, that Liebman "was at all times legally bound to pay the money into the Bankruptcy Court"; and third, "By so doing he avoided the expenses and annoyance of a suit".

Our answer to the foregoing is:

First: Having paid the money over to the Bankruptcy Court and having thereafter incurred a judgment for the same amount, less a credit, can this be anything but prejudice to Liebman's purse?

Second: Liebman or his surety could have ignored the demands of the trustee in bankruptcy and paid directly to the materialman, the appellee herein, and would thereupon have become subrogated to the rights of the materialman in the bankruptcy estate.

*American Bonding Co. of Baltimore v. Central Trust Co. of Illinois*, 240 Fed. 400;

*In re Scofield Co.*, 215 Fed. 45;

*U. S. Fidelity & Guaranty Co. v. Sweeney*, 80 Fed. (2d) 235.

Third: Instead of avoiding the expenses and annoyance of a suit, appellants have become obligated to pay the sum in dispute twice and have, in addition, incurred the expenses and annoyance of this litigation.

The case of

*Barnett v. Kemp*, 258 Mo. 139,

is cited by appellee, with the following excerpt therefrom:

“Estoppel cannot be based upon representations which tend only to induce a party to do some act which he is already bound to do.”

Our answer to this language is already contained in the hereinabove citations holding that the appellants herein were not bound to pay the money into the Bankruptcy Court, but could have paid the material-man directly.

The next citation of authority by appellee, at page 6 of his brief, is from

*United States v. Dunn*, 268 U. S. 121,

and contains the following excerpt:

“There can be no estoppel where there is no loss or injury, damage or prejudice, to the party claiming it.”

Once again we must declare that to our minds payment of an obligation twice most certainly represents injury, damage or prejudice.

Appellee's concluding citation relating to estoppel declares that in Vol. 25 *A. L. R.* 179 a host of authorities are cited in support of the rule that “estoppels are never based upon conjecture”.

We have read the annotation embodied in this citation and the estoppel discussed therein related to the delay of a bank depositor in notifying a bank of a

forgery. The annotation contains no authorities even remotely applicable to the issues herein.

Our argument "C" was supported by the case of *United States for the Use and Benefit of Noland Company v. Wood*, 99 Fed. (2d) 80, which holds that the doctrine of equitable estoppel is universally recognized by the Courts and that this doctrine can be applied in actions under the Heard Act (Miller Act). This decision also holds that to establish equitable estoppel it is not necessary that actual fraud be shown, but that it is only necessary to show that the person estopped by his statements or conduct misled another to his prejudice. (Appellants' Op. Br. pp. 20-22.) It is our belief that this Honorable Court would welcome some argument on the part of the appellee to show, if it is all possible, why the foregoing cited cases is inapplicable to the present case on appeal. The authorities cited in our argument "C" should not be by-passed by a five line statement such as contained in appellee's brief on appeal at pages 8 and 9, and we take the liberty to quote:

"Appellants in paragraph C of their Brief, have spread their hand on the table, so to speak, and figuratively proposed that someone else pick out the cards that will win for them. Answering becomes at once onerous and laborious."

Appellee does not contend that argument "C" is frivolous, but states that to answer argument "C" would involve too much labor and would be a burden.



**APPELLEE CANNOT NULLIFY THE TERMS OF THE STIPULATION WHICH IS A CONTRACT BETWEEN THE PARTIES, BY CONTENDING THAT THE MILLER ACT INSURES PAYMENT IN FULL TO A MATERIALMAN.**

The whole crux of appellee's argument is set out in one sentence at page 7 of his brief. We quote:

"In the present case the appellant would have the appellee estopped from enforcing a statutory right and privilege by stipulation which document did not even name or refer to that obligation."

By this language, appellee concedes that even though by the terms of the stipulation it was mutually agreed that Liebman should pay the money to the trustee, as suggested by the appellee, full compliance with this agreement did not constitute a waiver by the appellee of the provisions of the Miller Act.

The import of this statement is startling. Appellee, in effect, argues that under the Miller Act it had a statutory right to full payment of the sum due it and therefore could not be deprived of that right, even though it had waived it by written stipulation. The further implication is obvious. That is, appellee's written contract as evidenced by the stipulation is to be disregarded and the rights given it under the Miller Act and waived by the stipulation are to be revived. This revival, of course, to take place after Liebman has in good faith acted in conformance with the terms of the stipulation and paid his money over to the trustee in bankruptcy.

We will state the proposition a little more boldly. After prevailing upon Liebman to execute the stipula-

tion and pay the money, it tells Liebman, in substance, that the stipulation or agreement between them was a nullity and that it wants him to again pay the \$1438.52. To our minds, the disregard by the appellee of the sanctity that surrounds a written instrument mutually entered into cannot be explained or justified by the assertion by the appellee that it is the possessor of a statutory right entitling it to payment.

We have no quarrel with the authorities cited at page 7 of appellee's brief to the effect that a material-man may prove his claim in the bankruptcy of either the contractor or subcontractor and still not be precluded from proceeding under the payment bond. In the three cases cited by appellee there was not involved a stipulation such as entered into by the parties hereto and for that reason the appellee's citations are of no material advantage in arriving at a just determination of the issues herein.

In further justification of its position, appellee argues at page 7 of its brief that "estoppel always presupposes error upon one side and fault or fraud upon the other, of which it would be inequitable of one party to take advantage", and then, at the top of page 8 declares, "In the principal case we have no error, advantage, fraud, fault or deception".

In answer to these contentions we most respectfully direct this Honorable Court's attention to argument "C", pages 19 to 22 of appellants' opening brief, and particularly to the case of

*United States for Use and Benefit of Noland Co. v. Wood*, 99 Fed. (2d) 80, at page 83, wherein it was said:

“An estoppel may be prejudiced on representations not made with fraudulent intent, if they are of such a character as to induce a reasonably prudent man to believe that they were intended to be acted upon. (Citations.)”

Appellee also cites the case of

*Carpy v. James Dowdell et al.*, 115 Cal. 677, with the statement that the Court enunciated the principle “where both parties have knowledge of all the facts there can be no estoppel”.

We believe the additional language from *Carpy v. James Dowdell*, at pages 686 and 687, is also apropos:

“The principle of equitable estoppel is aptly and concisely stated by the supreme court of the United States in the opinion of Mr. Justice Clifford in *Swain v. Seamens*, 9 Wall. 274, in language that has since been frequently quoted and approved, as follows: ‘Where a person tacitly encourages an act to be done he cannot afterward exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim’; and the case at bar is not only within that principle, but is a much stronger case than one where a party only ‘tacitly encourages’ an act to be done. In *Dickerson v. Colgrove*, 100 U. S. 580, the United States supreme court states the principle as follows: ‘The vital principle is that he who by his language or conduct leads

another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.' ”

There is set out at page 9 of appellee's reply brief excerpts from three cases defining “waiver”. We do not dispute the general rules as declared in these excerpts. We do contend, however, that even under *Wienke v. Smith*, 179 Cal. 220, cited by appellee, the appellee intentionally relinquished its rights under the Miller Act and intended to resort to the stipulation and the consequent earmarking of the funds in the trustee's hands to effect a speedy collection of its claim. Appellee had its choice to pursue its claim under the Miller Act or to proceed under the stipulation. It relinquished its rights under the Miller Act the moment the stipulation was executed.

---

### CONCLUSION.

We repeat that the language of the stipulation, the acts and conduct of the parties hereto in reliance of its provisions and the recognition given to the stipulation by counsel for appellee, taken in the aggregate, can only lead to the conclusion that as a matter of law and equity an estoppel has been created which forever precludes appellee from asserting any right under the Miller Act.



The situation presented in this case of a man being requested to sign an agreement as represented by the stipulation and to pay his money in reliance thereon and to be thereafter virtually told the agreement is a nullity and that he was foolhardy in parting with his funds, cannot in law, equity, conscience, fair-dealing, or what you will, be defended by the claim that the Miller Act is a special surety right.

It is therefore most respectfully submitted that for the foregoing reasons the judgment of the lower Court should be reversed.

Dated, San Francisco, California,  
January 4, 1946.

JOSEPH C. HAUGHEY,  
*Attorney for Appellants.*

No. 11107

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

JOHN FANNON,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court for the Territory of  
Alaska, Third Division

FILED

DEC 26 1945

PAUL P. O'BRIEN,  
CLERK



No. 11107

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JOHN FANNON,

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Appellee.

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Transcript of Record

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Upon Appeal from the District Court for the Territory of  
Alaska, Third Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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\*Page numbering appearing at foot of page of original certified Transcript.

In the District Court for the Territory of Alaska  
Third Division

No. 1848, Criminal

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

JOHN FANNON,

Defendant.

### INDICTMENT

John Fannon is accused by the Grand Jury of the Territory of Alaska, Division Number Three, by this indictment, of the crime of knowingly failing and neglecting to perform a duty required of him under the provisions of the "Selective Training and Service Act of 1940, as amended," and the rules and regulations made and directions given thereunder, committed as follows:

The Said John Fannon, on or about the 30th day of October, 1944, within the jurisdiction of this Court, then and there being, and being then and there a registrant under the "Selective Training and Service Act of 1940, as amended", with the Local Selective Service Board Number One, at Kelso, Washington, and being then and there a transfer registrant with Local Selective Service Board Number One, at Anchorage, Alaska, did wilfully, knowingly, feloniously and unlawfully fail and neglect to perform a duty required of him under and in the execution of said Act and the rules

and regulations made pursuant thereto in that, having been classified by his local board, the same being Local Board Number One, at Kelso, [2] Washington, in Class 1-A, and having been duly and regularly transferred to Local Board Number One, at Anchorage, Alaska, for induction, and having been theretofore duly ordered and notified by said Local Board Number One, at said Anchorage, to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, pursuant to the powers conferred upon such Board by the "Selective Training and Service Act of 1940, as amended" and the rules and regulations duly made pursuant thereto, the said John Fannon did then and there wilfully, feloniously, knowingly, and unlawfully fail and neglect to report at Fort Richardson, Alaska, for induction, as he was required to do by said order, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Dated at Anchorage, Alaska, this 23rd day of March, 1945.

/s/ RAYMOND E. PLUMMER

Assistant United States

Attorney

Witnesses examined before the Grand Jury:  
Louise Annabel, Ruth Anderson. [3]

Endorsed on the back thereof:  
District Court Territory of Alaska, Third Division  
No. 1848 Cr.

UNITED STATES OF AMERICA,

vs.

JOHN FANNON

INDICTMENT

Violation of Selective Training and Service Act of  
1940, as amended.

A True Bill,

/s/ JACK R. PECK

Foreman

Presented to the Court by the Foreman of the  
Grand Jury in open Court, in the presence of the  
Grand Jury and filed in the District Court, Terri-  
tory of Alaska, Third Division. Mar. 24, 1945.

/s/ M. E. S. BRUNELLE

Clerk. [4]

United States of America,  
Territory of Alaska—ss.

This is to Certify that I, Rose Walsh, acting  
U. S. Commissioner for the Anchorage Precinct,  
Third Judicial Division, Territory of Alaska have  
compared the attached transcript with the original  
records and that the same is a full, true and correct  
copy and all and the whole thereof on page 185 of  
Vol. No. 13 of Criminal.



In Witness Whereof, I have hereunto set my hand and have affixed my official seal at Anchorage, Alaska, this 30th day of January, 1945.

(Seal)      /s/ ROSE WALSH

Acting U. S. Commissioner

[Endorsed]: Filed Jan. 30, 1945. [5]

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In the United States Commissioner's Court for the Territory of Alaska, Third Judicial Division, Anchorage Precinct.

No. 5342

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN FANNON,

Defendant.

TRANSCRIPT OF PROCEEDINGS

before acting U. S. Commissioner.

1945

Jan. 9—Complaint filed in writing, verified on oath of Raymond E. Plummer, charging defendant with violation of Section 11, Selective Service and Training Act of 1940 as amended.

Jan. 9—Warrant issued to U. S. Marshal for execution.

Jan. 9—Warrant returned not served

Jan. 9—Telegraphic Warrant sent to Fairbanks

1945

Jan. 10—Warrant served and arrest of defendant

Jan. 13—Bail in the amount of \$1500.00 check from  
J. A. McDonald, U. S. Marshal

Jan. 16—Subpoena issued for witness

Jan. 16—Defendant appeared with his Attorney,  
Karl A. Drager, and advised of his rights,  
waived right to make statement. Louise  
Annabel testified on behalf of the United  
States.

Jan. 16—Judgment. Defendant appearing with his  
attorney, Karl A. Drager, and being ad-  
vised of his right to make statement,  
waived Statement. Louise Annabel ap-  
pearing as witness for the United States  
and from the testimony produced before  
me, and it appearing that the crime of  
Violation of Section No. 11, Selective  
Service and Training Act of 1940 as  
Amended has been committed, and that  
there is sufficient cause to believe John  
Fannon guilty thereof, I order him held  
to answer in the sum of \$1500.00 as bail.

Done in open Court this 16th day of January,  
1945.

(Seal)     /s/ ROSE WALSH

Acting U. S. Commissioner.

Herewith attached the following original papers  
and pleadings: Verified complaint, warrant of ar-  
rest, Telegraphic warrant, subpoena, Check  
\$1500.00 signed by J. A. McDonald, letter. Judg-  
ment. [7]

In the United States Commissioner's Court for the  
Territory of Alaska, Third Division, Anchor-  
age Precinct at Anchorage.

No. 4342

UNITED STATES OF AMERICA

vs.

JOHN FANNON

COMPLAINT

For Violation of Section 11, Selective Service &  
Training Act of 1940, as Amended.

John Fannon is accused by Raymond E. Plum-  
mer in this Complaint of the crime of.....  
..... committed as  
follows, to-wit:

The Said John Fannon in the Territory of  
Alaska, and within the jurisdiction of this Court,  
did wilfully, feloniously and unlawfully, on the  
30th day of October, 1944, at Anchorage, Alaska,  
fail to report for induction as ordered by Local  
Board No. 1 of Anchorage, Alaska, contrary to the  
form of the statute in such case made and provided  
and against the peace and dignity of the United  
States of America.

/s/ RAYMOND E. PLUMMER

United States of America,  
Territory of Alaska—ss.

I, Raymond E. Plummer being first duly sworn,  
depose and say that the foregoing complaint is true.

/s/ RAYMOND E. PLUMMER

Subscribed and sworn to before me this 9th day  
of January, 1945.

(Seal) /s/ ROSE WALSH

Acting Commissioner and ex-officio justice of the  
Peace. At Anchorage, Alaska. [8]

In the United States Commissioner's Court, Ter-  
ritory of Alaska, Third Division, Anchorage  
Precinct at Anchorage.

No. ....

UNITED STATES OF AMERICA

vs.

JOHN FANNON

### WARRANT OF ARREST

In the Name of the United States of America:  
To the United States Marshal of the Territory of  
Alaska, Third Division, or Any of His Dep-  
uties,

Greeting:

Information upon oath having been this day laid  
before me that the crime of failing to report for  
induction, as ordered by Local Board No. 1 at An-

chorage has been committed and accusing John Fannon thereof,

You Are, Therefore, hereby commanded forthwith to arrest the above-named John Fannon and bring him before me at my office in Anchorage, Alaska or, in case of my absence or inability to act before the nearest accessible magistrate.

Dated at Anchorage, Alaska, this 9th day of January one thousand nine hundred and forty-five.

(Seal)     /s/ ROSE WALSH  
Acting United States Commissioner and ex-Officio  
Justice of the Peace.

Bail \$1500.00. [10]

In the United States Commissioner's Court for the  
Territory of Alaska, Third Judicial Division,  
Anchorage Precinct.

No. 5342

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

JOHN FANNON,  
Defendant.

### JUDGMENT

Defendant appearing with his attorney, Karl A. Drager, and being advised of his right to make statement, waived statement. Louise Annabel appearing as witness for the United States and from the testimony produced before me, that the crime



of Violation of Section 11, Selective & Training Act of 1940 as Amended has been committed and that there is sufficient cause to believe John Fannon guilty thereof, I order him held to answer in answer in the sum of \$1500.00 bail.

Done in Open Court this 15th day of January, 1945.

(Seal)      /s/ ROSE WALSH

Acting U. S. Commissioner

In the United States Commissioner's Court for the  
Territory of Alaska,, Third Division Anchor-  
age Precinct at Anchorage.

United States of America,  
Territory of Alaska—ss.

### SUBPOENA

To Louise Annabel, Greeting:

You Are Commanded to be and appear before the undersigned, a United States Commissioner at Anchorage, Alaska, at the hour of 2 o'clock P.M., on the 16th day of January, 1945, at the courthouse in Anchorage, Alaska, then and there to testify as a witness in a criminal action, wherein the United States is Plaintiff and John Fannon; and bring with you all the records of Local Draft Board No. 1, Anchorage, Alaska, in connection with registrant John Fannon; is Defendant, on behalf of the Plaintiff. Hereof Fail Not.

In Witness Whereof, I have hereunto set my

hand and official seal this 16th day of January, 1945.

(Seal)     /s/ ROSE WALSH  
Acting Commissioner and Ex-Officio Justice of the  
Peace.

On the back thereof:

United States of America,  
Territory of Alaska—ss.

I Certify that I received the within Subpoena on the 16th day of January, 1945, and executed the same on the 16th day of January, 1945, by reading and showing the original and delivering a copy thereof to Louise Annabel, the person therein named, at Anchorage, Alaska. [14]

JAMES H. PATTERSON

United States Marshal

By /s/ OSCAR OLSON

Deputy United States Mar-  
shal [15]

Department of Justice

United States Marshal

Fourth Division, District of Alaska

Fairbanks

January 11, 1945

Miss Rose Walsh,  
Acting U. S. Commissioner,  
Anchorage, Alaska.

Dear Miss Walsh:

Herewith enclosed is my official check No. 1398

for \$1,500.00 to your order, covering cash bail deposited in the case of U. S. vs. John Fannon.

Fannon was arrested yesterday afternoon and released under the above bail. He stated that he would return to Anchorage in connection with this case today if he could obtain space.

Yours very truly,

J. A. McDONALD,

U. S. Marshal,

/s/ By E. A. TONSETH,

Office Deputy.

Cncls.

P. S. The telegraphic warrant, with our return of service, was air mailed to the U. S. Marshal, Anchorage, last evening. [16]

4th Div. Terr. of Alaska, Received, Jan. 10, 1945.

Office of U. S. Marshal Fairbanks, Alaska

KFB V KZENR46

From Edmunds Anchorage Alaska January 9 1944  
to Joseph McDonald United States Marshal

Fairbanks, Alaska

0763

GR178 JUS

Hold the Following Warrant of Arrest Quote in the United States Commissioners Court Territory of Alaska Third Division Anchorage Precinct at Anchorage CMA United States of America v John Fannon CMA Warrant of Arrest CMA in the Name of the United States of America Colon to the

United States Marshal of the Territory of Alaska  
Third Division or Any of His Deputies Greeting  
Information Upon Oath Having Been This Day  
Laid Before Me That the Crime of Failing to Re-  
port for Induction As Ordered by Local Board  
Number One at Anchorage Has Been Committed  
and Accusing John Fannon Thereof Period You  
Are Thereby Hereby Commanded Forthwith to Ar-  
rest the Above Named John Fannon and Bring  
Him Before Me at My Office in Anchorage Alaska  
or in Case of My Absence or Inability to Act Before  
the Nearest Accessible Magistrate Period Dated at  
Anchorage Alaska This Ninth Day of January One  
Thousand Nine Hundred and Forty Five Period  
Signed Rose Walsh Acting United States Commis-  
sioner and Ex Officio Justice of the Peace Unquote  
Bail Set at Fifteen Hundred Dollars

0253Z [17]

United States of America,  
Territory of Alaska—ss.

I Hereby Certify That I received the above war-  
rant on the 10th day of January, 1945, and served  
the same by arresting the winthin-named defendant,  
at Fairbanks, Alaska, upon the 10th day of Jan-  
uary, 1945, and thereupon released defendant under  
\$1500.00 cash bail.

Dated at Fairbanks, Alaska, January 10, 1945.

J. A. McDONALD

U. S. Marshal

By /s/ CHESTER T. SPENCER,

Deputy [19]

No. 1848 Cr.

## M. O. SETTING TIME FOR ARRAIGNMENT

Now at this time, on motion of Raymond E. Plummer, Assistant United States Attorney,

It Is Ordered that the time for the arraignment of the defendant in cause No. 1848 Cr., entitled United States of America, plaintiff, vs. John Fannon defendant, be, and is hereby, set for 2:00 o'clock P. M. of Wednesday, March 28, 1945.

Entered Court Journal No. G-10 Page No. 94  
Mar. 28, 1945. [20]

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No. 1848 Cr.

## ARRAIGNMENT AND PLEA OF NOT GUILTY

Now on this day came Raymond E. Plummer, Assistant United States Attorney, for and in behalf of the Government, came also the defendant John Fannon in cause No. 1848 Cr., entitled United States of America, plaintiff, vs. John Fannon, defendant, in person and represented by his counsel, Karl A. Drager, Esq.; whereupon defendant was brought before the bar of this Court and being asked if he was indicted by his true name and answering that he was, defendant and his counsel both expressly waived the reading of the indictment and a copy of said indictment, including a list of the names of the witnesses appearing before the Grand Jury for the purpose of the indictment, was delivered to said defendant by the Clerk of the Court;



Whereupon, defendant, in person, and through his counsel, expressly waived time to plead and announced to the Court that he is ready to enter his plea herein, and being asked by the Court if he is guilty or not guilty of the crime charged against him in the indictment, to-wit: Knowingly failing and neglecting to perform a duty required of him under the provisions of the Selective Training and Service Act of 1940, as amended, and the rules and regulations made and directions given thereunder, defendant says he is not guilty and therefore puts himself upon the Country, and the Assistant United States Attorney, for and in behalf of the Government, does the same.

Entered Court Journal No. G 10 Page No. 128,  
Apr. 2, 1945. [21]

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No. 1848 Cr.

### M. O. SETTING CAUSE FOR TRIAL

Now at this time, on motion of Karl A. Drager, Esq., counsel for the defendant, Raymond E. Plummer, Assistant United States Attorney, being present and consenting thereto,

It is Ordered that cause No. 1848 Cr., entitled United States of America, plaintiff, vs. John Fannon, defendant, be, and is hereby, set for trial at 10:00 o'clock A. M. of Monday, April 9, 1945.

Entered Court Journal No. G-10 Page No. 135,  
Apr. 3, 1945. [22]

No. 1848 Cr.

## TRIAL BY JURY

Now came the members of the regular panel of Petit Jurors, not heretofore excused, came Raymond E. Plummer, Assistant United States Attorney, for and in behalf of the Government, came also the defendant in cause No. 1848 Cr., entitled, United States of America, plaintiff, vs. John Fannon, defendant, in person and with Karl A. Drager, Esq., of his counsel, and both sides announcing themselves as ready for trial, the following proceedings were had, to-wit:

The Clerk, under the direction of the Court, proceeded to draw from the trial Jury Box, one at a time, the names of the members of the regular panel of Petit Jurors, and respective counsel examined and exercised their challenges against the Jurors, so drawn, until both sides were satisfied and the Jury complete, consisting of the following named persons, to-wit:

1. Morris L. Porter
2. Oscar Nielsen
3. Mrs. Ingeborg Erickson
4. Selma Smith
5. John Beaton
6. Mrs. Florence Mau
7. Alva Rutherford
8. Peter Hoff
9. Cecil Burgan
10. Elizabeth Rexford
11. Signey H. Hamilton
12. Mrs. M. J. McDonald

which said Jury was duly sworn by the Clerk to well and truly try the matters at issue in the above entitled cause and a true verdict render in accordance with the evidence and the instructions given by the Court.

Whereupon the Court excused all members of the regular panel of Petit Jurors, not engaged in the trial of this cause, to report at 10:00 o'clock A. M. of Tuesday, April 10, 1945.

At 11:50 o'clock A. M., the Court duly admonished the Trial Jury, and continued the trial of this cause until 2:00 o'clock P. M. of Monday, April 9, 1945.

Entered Court Journal No. G 10 Page No. 161,  
Apr. 9, 1945. [22]

### Trial by Jury Continued

Now came the Trial Jury who, on being called, each answered to his or her name, came the defendant, in person, came also the respective counsel, as heretofore, and the trial of cause No. 1848 Cr., entitled United States of America, plaintiff, vs. John Fannon, defendant, was resumed.

Opening statement to the Jury was made by Raymond E. Plummer, Assistant United States Attorney, for and in behalf of the Government.

Statement to the Jury was made by Karl A. Drager, Esq., for and in behalf of the defendant.

Ruth Anderson, being first duly sworn, testified for and in behalf of the Government.

A folder containing the records and file of John

Fannon with Draft Board #1, Kelso, Washington, was duly offered, marked and admitted in evidence as plaintiff's Exhibit 1.

On cross examination of the witness Ruth Anderson, a letter from the Cowlitz County Local Board No. 1, Selective Service System, addressed to John Fannon, Anchorage, Alaska, dated August 27, 1943, was duly offered, marked and received in evidence as defendant's Exhibit A.

On cross examination of the witness Ruth Anderson, three return receipts for registered mail sent Local Board #1, Selective Service System, Kelso, Washington, by John Fannon, were duly offered, marked and admitted in evidence as defendant's Exhibits B-1, B-2 and B-3.

Louise Annabel, being first duly sworn, testified for and in behalf of the Government. [24]

A transfer Preinduction Physical Examination Application of John Fannon, dated July 25, 1944, was duly offered, marked and admitted in evidence as plaintiff's Exhibit 2.

An Order to report, Preinduction Physical Examination, addressed to John Fannon, dated August 11, 1944, was duly offered, marked and admitted in evidence as plaintiff's Exhibit 3.

A Certificate of Fitness of John Fannon, dated August 25, 1944, was duly offered, marked and admitted in evidence as plaintiff's Exhibit 4.

An Order to Report for Induction, addressed to John Fannon, dated September 26, 1944, was duly offered, marked and admitted in evidence as plaintiff's Exhibit 5.

A Request for Transfer for Delivery, of John Fannon, was duly offered, marked and admitted in evidence as plaintiff's Exhibit 6.

An Order to Report for Induction, addressed to John Fannon, dated October 18, 1944, was duly offered marked and admitted in evidence as plaintiff's Exhibit 7.

A Delinquent Registrant Report on John Fannon, addressed to Noel K. Wennblom, United States Attorney, dated October 30, 1944, was duly offered, marked and admitted in evidence as plaintiff's Exhibit 8.

M. E. S. Brunelle, being first duly sworn, testified for and in behalf of the Government.

The Government rests.

Raymond E. Plummer, being first duly sworn, testified for and in behalf of the defendant.

At 4:55 o'clock P. M., the Court duly admonished the Jury and continued the trial of this cause until 10:00 o'clock A. M. of Tuesday, April 10, 1945.

Entered Court Journal No. G 10 Page No. 163, Apr. 9, 1945, [25]

Now came the Trial Jury who, on being called, each answered to his or her name. came the defendant, in person, came also the respective counsel, as heretofore, and the trial of cause No. 1848 Cr., entitled United States of America, plaintiff, vs. John Fannon, defendant, was resumed.

The defendant rests.

The Government rests.



Opening argument to the Jury was had by Raymond E. Plummer, Assistant United States Attorney, for and in behalf of the Government.

Argument to the Jury was had by Karl A. Drager, Esq., for and in behalf of the defendant.

Closing argument to the Jury was had by Raymond E. Plummer, Assistant United States Attorney, for and in behalf of the Government.

Whereupon the Court read its instructions to the Jury and George Johnson and Mrs. Jessie M. Dolan were duly sworn by the Clerk as bailiffs in charge of said Jury, and at 12:10 o'clock P. M. the Jury retired in charge of their sworn bailiffs to deliberate upon their verdict.

Entered Court Journal No. G 10 Page No. 166,  
Apr. 10, 1945. [26]

Now at 2:25 o'clock P. M. came the Jury, in charge of their sworn bailiffs, who, on being called, each answered to his or her name, came also Raymond E. Plummer, Assistant United States Attorney, came also the defendant with his counsel, Karl A. Drager, Esq., and said Jury did present, by and through their Foreman, in open Court, their verdict in cause No. 1848 Cr., entitled United States of America, plaintiff, vs. John Fannon, defendant, which are in words and figures as follows, to-wit:

“In the District Court for the Territory of Alaska  
Third Division

No. 1848, Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN FANNON,

Defendant.

VERDICT

We, the jury, duly selected, impaneled and sworn to try and determine the issues in the above entitled case, find the defendant guilty as charged in the indictment herein. With recommendation for leniency.

Dated at Anchorage, Alaska, this 10 day of April, 1945.

/s/ MORRIS L. PORTER

Foreman

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division Apr. 10, 1945. M. E. S. Brunelle, Clerk. By Maxine Stringfellow, Deputy.

Entered Court Journal No. G 10 Page No. 166, Apr. 10, 1945.

and after polling of Jury the court ordered the verdict filed and discharged the Jury to report at 3:30 o'clock P. M. of [27] Tuesday, April 10, 1945.

Entered Court Journal No. G 10 Page No. 166, Apr. 10, 1945. [28]

In the District Court for the Territory of Alaska  
Third Division

No. 1848, Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN FANNON,

Defendant.

### VERDICT

We, the jury, duly selected, impaneled and sworn to try and determine the issues in the above entitled case, find the defendant guilty as charged in the indictment herein. With recommendation for leniency.

Dated at Anchorage, Alaska, this 10 day of April, 1945.

/s/ MORRIS L. PORTER  
Foreman

Entered Court Journal No. G 10 Page No. 166,  
Apr. 10, 1945.

[Endorsed]: Filed Apr. 10, 1945. [29]

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No. 1848 Cr.

### M. O. PRONOUNCING SENTENCE

Now at this time came Raymond E. Plummer, Assistant United States Attorney, for and in behalf of the Government, came also the defendant, in person and with his counsel, George B. Grigsby, Esq., and this being the time heretofore set for

pronouncement of sentence in cause No. 1848 Cr.,  
entitled United States of America, plaintiff, vs.  
John Fannon, defendant,

The Court now pronounces sentence against said  
defendant and directed the Assistant United States  
Attorney to prepare and submit a written judgment  
and sentence in accordance with the oral sentence  
given herein.

Entered Court Journal No. G 10 Page No. 394,  
June 12, 1945. [30]

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Name and Address of Appellant: John Fannon,  
428 E. 4th Avenue, Anchorage, Alaska.

Name and Address of Appellant's Attorney:  
George B. Grigsby, 824 N. Street, Anchorage,  
Alaska.

Offense: Knowingly failing and neglecting to  
perform a duty required of him under the provisions  
of the Selective Training and Service Act of  
1940, as amended, and the rules and regulations  
made and directions given thereunder.

Date of Judgment: June 12, 1945.

Brief Description of Judgment or Sentence: Im-  
prisonment in the Federal Jail at Anchorage,  
Alaska, for a term of one (1) year, and a fine of  
Two Thousand (\$2,000.00) Dollars.

Name of Prison Where Now Confined If Not on  
Bail: Released on bail.

I, the above named Appellant, hereby appeal to

the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

/s/ JOHN FANNON

Appellant

Dated June 16, 1945. [31]

## GROUND OF APPEAL

### 1.

Insufficiency of the evidence to justify conviction in that there was no evidence supporting the allegation of the indictment that the defendant did wilfully fail to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944.

### 2.

Errors in law occurring at the trial in the admission and rejection of evidence, and excepted to by the defendant, which defendant is at this time unable to specify for the reason that the stenographer's notes of the trial are not available, owing to the absence of the Court Stenographer from Anchorage, Alaska, and for the reason that the attorney for defendant, who represented him at the trial, is now deceased.

### 3.

Error in law occurring at the trial and excepted to by the defendant in that the Court refused to instruct the jury on the question of criminal intent, as requested by defendant in his written request for such instruction, presented to the Court in



writing and on file in the records and files in this action.

4.

Errors in law occurring at the trial and excepted to by the defendant as set forth in defendant's written "Memorandum of Exceptions" to the Court's instructions, said memorandum being on file in the records and files of this action.

5.

Error of the Court in overruling defendant's motion for a new trial, filed April 14, 1945, to which ruling defendant excepted and exception was allowed.

6.

Error of the Court in overruling defendant's amended motion for new trial, filed May 1, 1945, to which ruling defendant excepted and exception was allowed.

7.

Error of the Court and abuse of discretion in overruling defendant's motion for a new trial, based on newly discovered evidence, filed June 8, 1945, to which ruling defendant excepted and exception was allowed.

Service acknowledged June 18, 1945 at 1:40 P. M.  
for

RAYMOND E. PLUMMER,

Asst. U. S. Attorney

/s/ CATHERINE BRUNDAGE

Deputy Clerk

[Endorsed]: Filed June 16, 1945. [32]

No. 1848 Cr.

M. O. EXTENDING TIME TO FILE BILL OF  
EXCEPTIONS

Now at this time, on oral motion of George B. Grigsby, Esq., counsel for the defendant in cause No. 1848 Cr., entitled United States of America, plaintiff, vs. John Fannon, defendant,

It Is Ordered that the appellant shall have sixty (60) days in which to procure to be settled and filed with the Clerk of the Court a bill of exceptions in said cause.

Entered Court Journal No. G 10 Page No. 423,  
June 23, 1945. [33]

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In the District Court for the Territory of Alaska  
Third Division

No. 1848, Criminal.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

JOHN FANNON,  
Defendant.

## JUDGMENT AND SENTENCE

This cause coming on to be heard before this Court on the 12th day of June, 1945, the United States of America appearing, and being represented by Raymond E. Plummer, Assistant United

States Attorney for the Third Division, Territory of Alaska, and the defendant being personally present in Court, and being represented by his attorney, Geo. B. Grigsby, Esquire, and it appearing to the Court that on the 24th day of March, 1945, the Grand Jury, duly empaneled and sworn for the Third Division of the Territory of Alaska, returned an indictment in one count, charging the above named defendant with the crime of violating the Selective Training and Service Act of 1940, as amended; thereafter, and on the 2nd day of April, 1945, said defendant personally appeared in Court with his attorney, Karl A. Drager, Esquire, and was duly arraigned, and defendant and his counsel both expressly waived the reading of the indictment, and a copy of said indictment, including a list of the names of the witnesses appearing before the Grand Jury for the purpose of the indictment was delivered to said defendant by the Clerk of the Court; and [34] said defendant was asked if he was indicted by his true name, to which he answered in the affirmative; thereafter, and on the 2nd day of April, 1945, said defendant appeared in Court with his counsel and entered his plea of not guilty to the crime charged in the indictment filed herein;

And it appearing to the Court that heretofore, upon a full trial before this Court and a Jury, the defendant, John Fannon, was found guilty of the crime of knowingly failing and neglecting to perform a duty required of him under the provi-

sions of the Selective Training and Service Act of 1940, as amended, and the rules and regulations made, and directions given thereunder, as charged in said indictment, heretofore found by the Grand Jury of the Territory of Alaska, Third Division, against said defendant, John Fannon;

Whereas by reason of the law and the premises;

It Is Considered, Adjudged, and Ordered, and the Court does hereby Consider, Adjudge, and Order that the defendant, John Fannon, is guilty as found by said verdict of said Jury of the crime of knowingly failing and neglecting to perform a duty required of him under the provisions of the Selective Training and Service Act of 1940, as amended, and the rules and regulations made and the directions given thereunder, as charged in said indictment, for having on or about the 30th day of October, 1944, within the jurisdiction of this Court, and being then and there a registrant under the Selective Training and Service Act of 1940, as amended, with Local Selective Service Board Number One, at Kelso, Washington, and being then and there a transfer registrant with Local Selective Service Board Number One, at Anchorage, Alaska, wilfully, knowingly, feloniously, and unlawfully failing and neglecting to perform a duty required of him under and in the execution of said Act and the rules and regulations [35] made pursuant thereto in that, having been classified by his Local Board, the same being Local Board Number One, at Kelso, Washington, in Class 1-A, and having

been duly and regularly transferred to Local Board Number One, at Anchorage, Alaska, for induction, and having been theretofore duly ordered and notified by said Local Board Number One, at said Anchorage, to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, pursuant to the powers conferred upon such Board by the Selective Training and Service Act of 1940, as amended, and the rules and regulations duly made pursuant thereto, the said John Fannon wilfully, feloniously, knowingly, and unlawfully failed and neglected to report at Fort Richardson, Alaska, for induction, as he was required to do by said order, as charged by said indictment filed herein;

Thereafter and on the 12th day of June, 1945, said defendant and his counsel Geo. B. Grigsby, Esquire, personally appeared in Court and the said defendant was asked by the Court if he had anything to say why sentence of the Court should not be pronounced against him, and his counsel having been heard by the Court,

Now, Therefore, it is the Order and Sentence of the Court that the defendant, John Fannon, for said offense by him committed be imprisoned in the Federal Jail at Anchorage, Alaska, for the term and period of One (1) Year, and that said defendant pay a fine of Two Thousand (\$2000.00) Dollars, and that he stand committed until said sentence is executed.

It Is Further Ordered that the said defendant, John Fannon, upon his failure to pay the fine



herein pronounced be imprisoned in the Federal Jail at Anchorage, Alaska, One (1) Day for each Two (\$2.00) Dollars thereof; [36]

It Is Further Ordered that the Judgment and Sentence herein pronounced shall take effect and commence upon the 12th day of June, 1945, the date upon which the oral Judgment and Sentence of the Court was pronounced.

Signed in Open Court at Kodiak, Alaska, on this 27th day of June, 1945.

/s/ ANTHONY J. DIMOND

District Judge.

Receipt is hereby acknowledged of the foregoing Judgment and Sentence by me this.....day of ..... , 1945, at Anchorage, Alaska.

.....

Attorney for Defendant.

Entered Court Journal No. G 10 Page No. 441, June 27, 1945.

[Endorsed]: Filed June 27, 1945. [37]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered:

That this cause came on for trial before the above-entitled court, sitting at Anchorage, Alaska, on the 9th day of April, 1945, the plaintiff appearing by Assistant United States Attorney, Raymond E. Plummer, the defendant appearing in person and by his attorney, Karl A. Drager, and the following proceedings were had: A jury having been duly impaneled and sworn,

RUTH V. ANDERSON,

called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination

By Raymond E. Plummer, Assistant United States Attorney:

My name is Mrs. Ruth V. Anderson, I reside at Kelso, Washington, and am employed by the Kelso Selective Service Board in the capacity of assistant clerk for Local Board No. 1. As part of my duties as such assistant clerk I have the care, custody and control of the records of that office. The object which has just been handed to me is the file of John Fannon of Local Board No. 1 of Kelso, Washington; that is the original record of Local Board No. 1 of Kelso, Washington of John Fannon. [38]

The file identified by the witness was offered and

(Testimony of Ruth V. Anderson.)

admitted in evidence without objection and marked "Plaintiff's Exhibit No. 1".

(This and other exhibits not read to the jury are hereunto appended, and made a part of this Bill of Exceptions.) [39]

Witness continuing: According to the file the latest address we had was in care of Karl Krager, Anchorage, Alaska. The file shows that Mr. Fannon registered with Local Board No. 1 on October 16, 1940. According to the summary of actions taken by the Local Board No. 1, Kelso, Washington, according to the questionnaire I have before me, on April 16, 1941 registrant was classified 4-F and Form 57 mailed to registrant. On May 22, 1941 he was reclassified to Class 3 and notice of classification mailed to registrant the next day. On October 6, 1942 he was classified 1-H. On November 9, 1942 the registrant was classified to 1-A and on November 10, 1942 notification was sent to the registrant. On November 16, 1942 he was reclassified to 2-B and on November 17, 1942 the notice of that classification was mailed to the registrant. On February 8, 1943 he was reclassified to Class 1. On May 1, 1943 he was reclassified to 1-A and on the 6th notice of classification was mailed to the registrant. On October 18, 1943 registrant was rejected at induction station—pardon me—registered on August 17, 1943 and reclassified to 4-F October 18, 1943. On October 21, 1943 registrant was mailed notice of such classification, form 57,

(Testimony of Ruth V. Anderson.)

and appeal agent notified. On June 29, 1944 registrant was reclassified to 1-A and notice of classification mailed on July 7, 1944 and appeal agent notified. On September 20, 1944 form 218 was mailed to registrant and he was qualified for Army General Service under preinduction physical dated August 25, 1944.

Q. Referring to your records there his classification in August of 1944 was what?

A. 1-A.

Q. Does your file reflect whether or not he was ordered to report for preinduction physical examination?

A. He qualified on August 25th. [40] My record shows that he was ordered to report for induction by Local Board No. 1 at Kelso, Washington on October 12 and transferred to the Board here. He was transferred automatically by direction of the State Director. The regulations provide for such transfer. He was duly and regularly transferred to Local Board No. 1 of Anchorage, Alaska. We have a letter from the registrant written February 17, 1945. (Witness reads letter) as follows: "This is addressed to Local Board No. 1, Cowlitz County, Post Office Building, Kelso, Washington. Re: John Fannon, Order #2253, under date of February 17, 1945. Gentlemen: Since making my last report to you of my illness under date of November 1, 1944, I have been released from the hospital and have been receiving out-patient treatment: however, upon the advice of the doctor I am going to attend and

(Testimony of Ruth V. Anderson.)

go through the clinic at Portland, Oregon. On my way en route thereto I will endeavor to report in to your Board in person. At the time of my release from the hospital I was placed under arrest for violation of the Selective Service Act in not reporting for induction at the time I was in the hospital, and have been bound over to the Grand Jury. My marital status has changed since my last report in that I was divorced and then remarried. Very truly yours, signed by John Fannon.”

Witness continuing: That letter does not clear the delinquency. It is merely a statement from the registrant that he would report to us. He had already been reported to the District Attorney and it is out of our hands. After that letter was written he has not to my knowledge contacted our draft board at Kelso, Washington. We have a letter from Mr. Drager, attorney, as of November 1, regarding registrant's being confined in the hospital, but no request for a postponement just a statement of fact. There is no record of any [41] postponement on induction of Mr. Fannon in relation to that order to report for induction on October 30, 1944. There was never a postponement. There was never a request or application made for postponement of induction. The file does not reflect any such request.

The Court: Mr. Plummer, looking at it (Plaintiff's Exhibit No. 1) from the exterior, it seems that is quite a voluminous file, and I do not know that all of it really is relevant to any facts which



(Testimony of Ruth V. Anderson.)

will go to the jury in this case; and therefore it may be considered proper not to send the exhibit to the jury as a whole, so if there are any part or parts of it which you think are material, I suggest that the attention of the witness be directed to them now, and such parts read to the jury or identified, so we will know what parts will go. Otherwise it will be like hunting a needle in a haystack unless it has heretofore been called to the attention of the jury.

Mr. Plummer: I think the entire file has a bearing on the motive or intent which will have to be shown in this case, your Honor.

The Court: I am not making any ruling on it now. You are content to leave it as it is?

Mr. Plummer: Yes. I believe that is all.

The Court: You may cross examine, Mr. Drager.

Mr. Drager: If the Court please, I believe if there are any particular items Mr. Plummer wanted brought to the attention of the jury it would be simple enough to have him ask for them. It is a broad proposition to submit the entire file. I haven't had an opportunity to examine it to see whether there are things prejudicial.

The Court: I would like to look at it first. You may take it in just a moment. [42]

Mr. Drager: As I remember the ruling, if counsel desires to introduce such exhibits that they be identified and at that time and place they are read to the jury.

The Court: Your recollection is correct, except

(Testimony of Ruth V. Anderson.)

there is another clause to the rule. The rule is that they may be read while the witness is on the stand; otherwise they may not be read. But there is no inhibition against sending them to the jury even though they are not read to the jury.

Mr. Drager: I would like to ask the witness a question. I believe you stated, Mrs. Anderson, that Mr. Fannon registered originally with the Kelso Board?

A. That is right.

Mr. Drager: Didn't he, as a matter of fact, register originally at Missoula, Montana, or do you know?

A. That I couldn't say without seeing his registration card. If he did, he must have given an address within Cowlitz County that would automatically send his card to our board.

Mr. Drager: If the Court please, I have no particular objection except to one or two matters in there; for example, there is an anonymous letter to the draft board, unsigned, and there are other things there I believe should be excluded, and I would be very glad to stipulate with Mr. Plummer if we could extract one or two things from the file I would stipulate the rest of those things could be admitted.

The Court: The exhibit is already admitted. The question is how much shall go to the jury on the final conclusion of the case. An anonymous letter ought not to be considered for any purpose. It is totally irrelevant, no matter what the charges contained may be. I think since it has already

(Testimony of Ruth V. Anderson.)

been admitted you had better proceed with your cross examination and before the case goes to the jury you can invite the attention of the Court to any matters you think ought not to be permitted to go to the jury. [43]

Mr. Drager: I believe some of them are totally irrelevant and totally inadmissible.

The Court: The Court will pass upon it at the time. You may proceed with cross examination.

### Cross Examination

By Karl A. Drager, Attorney for Defendant:

I live in Kelso, Washington, I have been employed as assistant clerk of the draft board there about three years. There is a Lila M. Mickens employed there at Local Board No. 1, at Kelso, Washington in the capacity of clerical assistant; there was a Genevieve Loose employed there for a short while. She is not there now, but she has been.

There was a Mary Frances Gunn employed there for a short while. I have been there during all that time. I came up by plane from Seattle, by way of Fairbanks; had a nice trip. The letter I testified I had received from Mr. Drager is as follows: "Drager Law Offices, Anchorage, Alaska, November 1, 1944. Addressed to Local Board No. 1, Cowlitz County, Post Office Building, Kelso, Washington. Re: John Fannon, Order #2253. Gentlemen: On behalf of John Fannon, who was ordered to

(Testimony of Ruth V. Anderson.)

report to the Local Board, Anchorage, October 30, for induction, you are informed that Mr. Fannon has been under the doctor's care and on or about October 28, 1944, was hospitalized at the Palmer Hospital, Palmer, Alaska, for a major operation. At the present time he is in the hospital convalescing from the operation. This information was given to the Local Board, Anchorage, but at the request of Mr. Fannon, I am forwarding it to you also. This communication is not for the purpose of change of address as no change of address is necessary. Palmer, Alaska, is adjacent to Anchorage, Alaska, and proper provisions have been made for forwarding and contacting. Very truly yours, John Fannon, by Karl A. Drager, Attorney." [44]

Witness continuing: I have a letter in the file here under date of August 20, 1943, from John Fannon. (Witness reads letter) as follows: "Anchorage, Alaska, August 20, 1943. Local Board No. 1, Cowlitz County, Post Office Building, Kelso, Washington. Gentlemen: Re: John Fannon—Order No. 2253. This is to inform you that recently I was inducted into the army at Anchorage, Alaska, and was discharged by reason of rejection on the seventeenth of August, 1943. At the time of rejection and discharge I was informed by the army officials that they would notify you of this action. However, I desire to inform you personally so that there will be no mistake. I have recently made application and have been accepted for employment on a defense project in the near vicinity of Anchor-



(Testimony of Ruth V. Anderson.)

age, Alaska. For that reason I desire to be transferred to the Anchorage local draft board and herewith make request that such transfer be made. Will you kindly inform me as to action taken in this matter. My address is c/o Karl A. Drager, attorney at law, Box No. 484, Anchorage, Alaska. Yours very truly, and it is signed, John Fannon."

Witness continuing: I have a letter in our file under date of September 24, 1943, (witness reads letter) as follows: "Care of Karl A. Drager, Attorney at Law, Post Office Box 484, Anchorage, Alaska, September 24, 1943. Local Board No. 1, Cowlitz County, Post Office Building, Kelso, Washington. Gentlemen: Re Order No. 2253. On August 20, 1943, I wrote you advising you that I had been inducted and discharged and requesting transfer to Anchorage local board, giving my address care of Karl A. Drager, Attorney at Law, Box 484, Anchorage, Alaska. I have since received under date of August 27, 1943, a letter from your Board informing me that a registrant is at all times under his own board and transfer is permitted only for medical examination or induction and that I am to keep you informed at all times of my [45] address and occupational status. I cannot be certain that this letter of August 27 is in reply to my letter of August 20th for the reason that it wasn't addressed to the address given by me in my letter. It was addressed only Anchorage, Alaska. In this connection I desire to invite your attention that I have yet to receive the original orders for induction



(Testimony of Ruth V. Anderson.)

which were supposedly mailed to me by your Board, and by reason of that failure to receive the induction papers I was placed under arrest for failure to report for induction, which caused me not only humiliation but considerable expense and inconvenience. Inasmuch as I have no desire to undergo any similar experience on account of failure to obtain delivery of mail from your Board, I have given you an address which will place my mail in care of my attorney who has a post office box, which are very difficult to obtain here. In this way I can be certain of being notified; provided, you do place the proper address on the envelope. At the present time I am employed as a plumber's helper on a local project. Yours very truly, John Fannon."

The Court: What is the date of that?

A. September 24, 1943.

Examination continued by Mr. Drager:

Witness is handed a letter by Mr. Drager and identifies it as a letter written in the office of the Cowlitz County Local Board. The letter is offered and admitted in evidence and marked "Defendant's Exhibit A".

Witness continuing: There is a copy of the letter in the file. (Witness reads letter) as follows: "Addressed to John Fannon, Anchorage, Alaska, regarding Order No. 2253, under date of August 27, 1943. Dear Sir: This is to advise that under Selective Service Regulations a registrant is under his board of registration at all times and transfer

(Testimony of Ruth V. Anderson.)

to another board is permitted only for medical examination or induction. It is therefore important that you keep this board informed [46] at all times of your present address and occupational status. Yours truly, Cowlitz County Local Board, Walter J. Vitous, Chairman, by Avis Benson, Clerk."

Witness continuing: When I said that Mr. Fannon had been transferred to the Anchorage Board, I meant for the purpose of induction only. The jurisdiction of the registrant remains in our Board. Yes, there are other letters, written matter, in the file regarding Fannon's case. Mr. Fannon did not to my knowledge report to the Board in person this spring. It is not of record in the file whether his father came there or not. I understood that his father contacted a member of the Board, but I don't know of anything that took place.

He was ordered for induction at one time at Anchorage. He was ordered to report for induction on August 17, 1943—ordered to report for physical examination and was rejected. Later he was classified to 1-A and ordered to report for physical examination. He reported August 25, 1944 and was accepted for military service. Yes, he reported and the records show he was examined on that date. After that reporting he was placed on call from the original board, credited to his original local board.

Q. In other words, if you had a call for 10 down there in Kelso and they had a call for 10 up

(Testimony of Ruth V. Anderson.)

here, if Mr. Fannon reported up here they would really send 11 and you would send 9?

A. That is right. We would place him on the induction list in our own board, then he would be transferred to this board and sent in addition to the number required from the board here.

Witness continuing: We get credit for it down there. We have a regular procedure of reporting delinquents in the [47] event of non-reporting. The cases of delinquents in reporting are rather rare. In the event we do have a report of a delinquent in reporting, whether or not we sometimes set them aside and have them come up for future induction, depends entirely upon the circumstances of the case. Generally a man is reported to the district attorney immediately when he fails to report for induction. The regulations say promptly. The regulations use the word promptly. That is under section 642.21. The board has discretion in the matter within a reasonable extent. However regulations state he should be reported promptly on failure to report. He is considered delinquent when he fails to report immediately. But it is still in the board's hands until it is reported to the district attorney. The board would have the power to make a stay in the induction but there would have to be some reason and a special request. That is in the discretion of the board and the state director, the latter being a sort of ex-officio officer with the board in matters of that kind, as regards approval.

Q. I would like to hand the witness these and

(Testimony of Ruth V. Anderson.)

see if she can tell what they are. You may be able to identify them by the signatures.

A. Return to John Fannon—

Q. I meant by the signatures of the clerk of your board.

A. Mary Frances Gunn. She was a clerical assistant of the local board No. 1 at Kelso for about two months.

Q. You are familiar with that form?

A. Yes. It is used by the Post Office for receipt of registered mail.

Q. It is addressed to your board is it?

A. Yes.

Q. Returned from your board?                      A. Yes.

Documents were then offered and admitted in evidence, and marked "Defendant's Exhibits B-1, B-2, B-3," and read to the jury, as follows: "One of these is dated October 12, 1943. Return to John Fannon, Box 484. Registered article No. 2842. It was received by the Local Board #1, Kelso, Washington, signed by Lila M. Mickens. Date of delivery October 2, 1943. Another one of the same type dated May 22, 1944, the Kelso postmark date. Registered article 10003, return to John Fannon. Signed by Geneva Leabo for Selective Service Board. Another card, same form, return to John Fannon, Box 484, care of Karl A. Drager, registered article 6956m dated February 20, 1945, and received by Local Board No. 1 by Frances Gunn. Date of delivery February 20, 1945."



(Testimony of Ruth V. Anderson.)

Q. You recognize all of those signatures as members of your official body down there.

A. That is right.

Witness continuing: I have resided in Kelso four years. I am not acquainted with Mrs. J. W. Ward there nor any of the Fannon family. I don't know whether Mrs. Ward is a sister of John Fannon. Kelso is a city of about seven thousand. They tell me Anchorage is about twelve thousand. In my official capacity I seldom attend any meetings of the Selective Service Board. The clerk attends the meetings generally. The clerk's name is Mrs. Avis Benson.

Q. You wouldn't be in a position to know, or would you, whether there was any special prejudice against this defendant by the board?

Mr. Plummer: I object to that question.

The Court: Objection sustained. The question of prejudice can't enter into this. Exception allowed.

Witness continuing: According to the regulations, the registrant is reported delinquent by the board to which [49] he is transferred for induction. Then the action would be taken by the board of transfer.

#### Re-Direct Examination

By Mr. Plummer:

Referring to Form D.S.S. 281, dated June 14, 1943, that is an official form of the department, Selective Service Form 281. This was the form that was mailed to the registrant.



(Testimony of Ruth V. Anderson.)

(Witness reads paper) as follows: "June 14, 1943, to John Fannon, Order No. 2253, addressed to Lansing Hotel, Tacoma, Washington. The printed form is as follows: Dear Sir: According to information in possession of this local board, you have failed to perform the duty, or duties, imposed upon you under the selective service law as specified below."——

Mr. Drager: I object on the ground that it is irrelevant and immaterial. It is too remote.

Mr. Plummer: You have availed yourself of letters dating back to August and September of 1943. I think the relevancy of this form is no more remote than these letters read in the previous examination by Mr. Drager.

Mr. Drager: I would like to know the purpose of it. I have a purpose in referring to the others. I can't see the purpose of this except to prejudice.

Mr. Plummer: May I state the purpose?

The Court: Yes.

Mr. Plummer: My purpose in having that read is that there are several other such forms in the file here, and it is my contention that the present charge is one of a series of events which are a part of a general scheme to evade the [50] selective service law and I think that all delinquencies similar to the ones charged in this indictment are relevant to show it is part of a scheme to evade the selective service law.

The Court: I am not sure of that and the defendant hasn't been indicted for that; however the

(Testimony of Ruth V. Anderson.)

subject has already been opened up by part of an exhibit that was read at the instance of counsel for the defendant in a letter written by the defendant in which he referred to embarrassment he suffered by reason of failure to receive notice to report for induction and some legal action. This is part of the same subject and the subject is already before the jury. I shall admit it. Objection overruled and exception allowed. You may read it.

A. Commencing where I left off, the Notice of Delinquency. Failure to report for induction. You are therefore directed to report, by mail, telegraph, or in person, at your own expense, to this local board, on or before 9:00 P. M., on the 19th day of June, 1943. Failure to report on or before the day and hour mentioned is an offense punishable by fine or imprisonment, or both.

Witness Continuing: That is the form in its entirety except for the instructions on how to make it out.

Mr. Plummer: Will the bailiff show it to Mr. Drager, please?

The Court: Why not mark the place Mr. Drager, and let counsel finish his redirect examination and you may refer to it on recross examination.

Q. That is the one of June 14, 1943 you have just read? A. Yes, sir.

Q. Will you turn to D. S. S. Form 281 dated April 10, 1943, and read that to the court and jury, please? [51]

Mr. Drager: Same objection.

(Testimony of Ruth V. Anderson.)

The Court: Same ruling. Objection overruled and exception allowed.

A. Notice of delinquency. April 10, 1943, to John Fannon, Order No. 2253, Lansing Hotel, Tacoma, Washington. The same form. Dear Sir: According to information in possession of this Local Board, you have failed to perform the duty, or duties, imposed upon you under the selective service law as specified below. Failure to report for physical examination. You are therefore directed to report, by mail, telegraph, or in person, at your own expense, to this Local Board, on or before 5:00 p. m., on the 15th day of April, 1943. Failure to report on or before the day and hour specified is an offense punishable by fine or imprisonment, or both. Clerk of Local Board.

Q. Will you turn to D. S. S. Form 281 dated June 6, 1942, and read that to the court and jury, please.

A. Notice of Delinquency. To John Fannon, Order No. 2253. Dear Sir: According to information in possession of this Local Board, you have failed to perform the duty, or duties, imposed upon you under the selective service law as specified below. To submit change of address. You are therefore directed to report, by mail, telegraph, or in person, at your own expense, to this Local Board, on or before 5:00 p. m., on the 11th day of June, 1942. Failure to report on or before the day and hour specified is an offense punishable by fine or imprisonment, or both.

(Testimony of Ruth V. Anderson.)

Q. Will you turn to D. S. S. Form 550 dated November 10, 1944, and read that please?

A. This form is a copy of the form Delinquent Registrant Report as made out by Local Board No. 1 at Anchorage, [52] Selective Service System Delinquent Report. To: Honorable Noel K. Wennblom, United States Attorney. Identification of delinquent: John Fannon, Registrant Local Board No. 1, Kelso, Washington, transferred to Local Board No. 1, Anchorage, Alaska. Order No. 2253. Selective Service Classification 1-A. Offenses. First is Social Security No. blank. Offenses: This delinquent failed to report for induction into the armed forces or for assignment to work of national importance pursuant to: check applicable box. In this case, Order to Report for Induction got 150 was checked. The order indicated was mailed on 18 October, 1944, to this delinquent at care of Karl Krager, Box 484, Anchorage, Alaska. In addition to failing to report for induction into the armed forces or for work of national importance as indicated above, this delinquent has also failed to perform the following duties at the times indicated, which is not filled in. Efforts made to locate delinquent. The delinquent has been located by Louise Annabel, Anchorage, Alaska, a Clerk.

The Court: May I intervene there? I didn't understand one line. Did it say that the registrant has been located?

A. Yes, according to the form that I have just



(Testimony of Ruth V. Anderson.)

read, that was sent to the Local Board No. 1 at Kelso by the Local board of Anchorage.

Witness Continuing: They had the authority to report this registrant as delinquent inasimuch as he had failed to appear. That document which appears before me is a letter received from John Fannon on July 31, 1944, in our office of the local board.

(Witness reads letter to court and jury as follows): "July 25, 1944. Dear Sirs: I have just received a card from you putting me in 1-A. I would like to know if I can [53] have enough time before induction to harvest our potato crop and cultivate. We have in 9 acres of potatoes, my partner is an old man and not capable of doing this and help is nearly impossible to obtain. It would work quite a hardship on my wife and child if the crop was a loss as she isn't hardly able to work and take care of a small child. Thanking you I remain, John Fannon, care of Karl Drager."

Witness Continuing: The letter was answered by another letter, copy of which is in the file. It was not considered as a deferment request. A farm deferment has to be recommended by the United States Department of Agriculture. According to his (Fannon's) classifications, he was at one time deferred to the Maritime Service, but that was back in November of 1942. Subsequent to that time I don't believe we had any definite information as to where Mr. Fannon was working. A record is kept of where he is employed or what his occupation is if the information is received. A



(Testimony of Ruth V. Anderson.)

deferred classification would only be given in case a regular form should be submitted by the employer.

### Recross Examination

By Mr. Drager:

Q. That isn't a request for reclassification, that letter? A. No.

Q. It doesn't ask for reclassification? It asks for a little time before induction?

A. Yes, sir.

Witness Continuing: Subsequent to that time the records show he was examined physically. He was examined on August 25, 1944. The letter was written on July 25th. The fact that July 25th coincides with the order for reporting for physical examination would be a coincidence, it would have nothing to do with it. [54]

Q. These forms of Notice of Delinquency, those were subsequently cured by some action, were they not? A. They were cleared up eventually.

Q. You don't have any form in there of notice of Delinquency sent to Mr. Fannon since October 30th, do you?

A. That procedure has been changed. The regulations do not provide for notice of delinquency to be mailed to the registrant any longer. The regulations now provide that we submit form 550 to the district attorney promptly and that is a report of the delinquency. It is out of the hands of

(Testimony of Ruth V. Anderson.)

the local board after the form is mailed to the district attorney.

Q. You lose jurisdiction?

A. It is up to the district attorney.

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LOUISE ANNABEL,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

Witness: My name is Louise Annabel. I reside in Anchorage. I am a clerk for the Selective Service Board, No. 1 of Anchorage, Alaska. I have been so employed for nearly two years in the capacity of clerk. As part of my duties as clerk of Board No. One at Anchorage, Alaska, I have the care and custody and control of records of that board. The object you are showing me is the office file of registrant John Fannon. It reflects his order number 2253. It reflects the address where mail, if addressed to that address, would always reach him. The address is care of Karl Drager, Box 484, Anchorage, Alaska. Mr. Fannon, according to the exhibits from the file, is not an original registrant with our Board but was transferred from Local Board No. One of Kelso, Washington. The paper you show [55] me is Transfer, Preinduction Physical Examination for John Fannon.

(Paper admitted in evidence and marked "Plaintiff's Exhibit No. 2.")

(Testimony of Louise Annabel.)

Witness continuing: The paper you ask me to inspect is Order to Report for Preinduction Physical Examination, directed to John Fannon. That is a part of the record of Local Draft Board No. One at Anchorage, Alaska.

(Paper admitted in evidence and marked "Plaintiff's Exhibit No. 3.")

Witness continuing: The paper you have handed me is Selective Service Form, Report of Physical Examination and Induction of John Fannon, Registrant. That is one of the records of Selective Service Board No. One at Anchorage, Alaska. It originated with the Kelso board but presently is in the custody of Local Board No. One at Anchorage, Alaska. Mr. Fannon was examined August 25, 1944. The paper reflects that he was examined by Sidney Leshner, Captain, Medical Corps. It shows that the examination was made, APO 942, United States Army.

(Paper offered in evidence and objection to its admissibility temporarily sustained.)

Witness continuing: The paper I have now inspected is Certificate of Fitness for John Fannon. It is dated August 25, 1944. It is the record of Local Draft Board No. One at Anchorage, Alaska. I have the custody and control of that record.

(Certificate offered and admitted in evidence and marked "Plaintiff's Exhibit No. 4.")

Witness continuing, examined by Mr. Drager: That certificate would be the result, would issue

(Testimony of Louise Annabel.)

as the result of [56] that report for physical examination, that is, the certificate that the physician gives to the Board after making an examination of the man, and filling in that report.

By Mr. Plummer:

The paper now handed me is Order to Report for Induction, addressed to John Fannon. The date of mailing is September 26, 1944. The Order was sent by Local Board No. One, Kelso, Washington. That record is in the custody and control of Local Board No. One at Anchorage, Alaska.

(Paper admitted in evidence and marked "Plaintiff's Exhibit No. 5.")

Witness continuing: The paper now handed me is DSS Form 154, Request for Transfer for Delivery. It requests transfer of registrant, John Fannon. It is dated as having been sent on September 27, 1944. It is a record which is in the custody and control of Local Draft Board No. One at Anchorage, Alaska. It originated with the Kelso Board and was sent to the Anchorage Board through the Territorial Director.

(Paper admitted in evidence and marked "Plaintiff's Exhibit No. 6.")

Witness continuing: The paper now handed me purports to be DSS Form 150, Order to Report for Induction, addressed to John Fannon. It is dated October 18, 1944. It is in the custody and



(Testimony of Louise Annabel.)

control of Local Draft Board No. One at Anchorage, Alaska.

(Paper admitted in evidence and marked "Plaintiff's Exhibit No. 7," and read by the witness to the jury as follows:)

"Prepare in duplicate. Date of mailing, October 18, 1944. Seal is of the Selective Service System and the Local Board Stamp, No. One of Anchorage, is dated October 18, 1944. Order to Report for Induction. The [57] President of the United States, to John Fannon, Order No. 2253, Greeting: Having submitted yourself to a local board composed of your neighbors for the purpose of determining your availability for training and service in the land or naval forces of the United States, you are hereby notified that you have been selected for training and service therein. You will, therefore, report to the local board named above at Room 128 Federal Building, Anchorage, Alaska, at 8:00 A.M., on the 30th day of October, 1944. This local board will furnish transportation to an induction station. You will there be examined, and, if accepted for training and service, you will then be inducted into the land or naval forces. Persons reporting to the induction station in some instances may be rejected for physical or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be



(Testimony of Louise Annabel.)

accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected. Willful failure to report promptly to this local board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940, as amended, and subjects the violator to fine and imprisonment. If you are so far removed from your own local board that reporting in compliance with this order will be a serious hardship and you desire to report to a local board in the area of which you are now located, go immediately to that local board and make written request for transfer of your [58] delivery for induction, taking this order with you. Signed by M. E. S. Brunelle, Member of clerk of the local board."

Witness continuing: The exhibit I have before me (Being exhibit just read) was sent by registered mail. A return receipt was requested. I have that return receipt before me.

(It is stipulated by Mr. Drager, counsel for defendant, that the letter in question was received by the addressee and that the date of the receipt was October 19, 1944.)

Witness continuing: The file handed me I have identified as the file of Local Draft Board No. One of Anchorage, Alaska, for registrant John Fannon. The file reflects that in respect to that order to report for induction he failed to report for induction on the 30th of October, 1944. The paper handed

(Testimony of Louise Annabel.)

to me is DSS Form 550. It is dated October 30, 1944. That form is Selective Service System Delinquent Registrant Report concerning registrant John Fannon. It is addressed to the Honorable Noel K. Wennblom, United States Attorney.

(Paper admitted in evidence and marked "Plaintiff's Exhibit No. 8.")

Q. Will you refer to the file of Selective Service Board No. 1. Local Board No. 1 of Anchorage, Alaska, and by referring to your file are you able to state whether or not the defendant, Mr. Fannon, ever made application or request for postponement of induction in connection with this Order to Report for Induction on the 30th of October, 1944?

A. No, sir.

Witness continuing: Referring to our files of Local Draft Board No. 1 of Anchorage, Alaska, no one else ever made [59] application or request for postponement of Mr. Fannon's induction, a request in his behalf in regard to the Order to Report for Induction on October 30, 1944. Again referring to the file, I can state that the induction of John Fannon was never postponed by Local Draft Board No. 1 of Anchorage, Alaska. Mr. Fannon has not, to my knowledge, since contacted our office; he has not, to my knowledge, contacted Local Draft Board No. 1 at Anchorage, Alaska, at any time since October 30, 1944.

(Testimony of Louise Annabel.)

Cross Examination

By Mr. Drager:

(Witness handed plaintiff's Exhibit No. 8 and reads same to the jury as follows:)

"Selective Service System Delinquent Registrant Report, Anchorage Local Draft Board No. 1 stamp dated October 30, 1944, date of mailing October 30, 1944. To Honorable Noel K. Wennblom, United States Attorney. 1. Identification of Delinquent: John Fannon Registrant Local Board No. 1, Kelso, Washington, Transferred to Local Board No. 1, Anchorage, Alaska, for induction, care of Karl Drager, Box 484, Anchorage, Alaska. Order Number 2253, Selective Service Classification 1-A. 2. Offenses. This delinquent failed to report for induction into the armed forces or for assignment to work of national importance pursuant to: and in parentheses, check applicable box. Order to Report for Induction form 150, was checked. Two other checks that could be made were: Order for Transferred Man to Report for Induction form 156 and Order to Report for Work of National Importance, form 50. The order indicated was mailed on 18 October, 1944, to this delinquent at care of Karl Drager, Box 484, Anchorage, Alaska. In addition to failing to report for induction into the armed forces or for work of national importance [60] as indicated above, this delinquent has also failed to perform the following duties at the times indicated. (The spaces following are

(Testimony of Louise Annabel.)

left blank.) 3. Efforts made to locate delinquent: The delinquent has been located by Louise Annabel, Anchorage, Alaska, a clerk, Local Board 1 on 30 October at Palmer, Alaska.

The Court: Is that all you wish read?

Mr. Drager: I am going to have her refer to it, if the Court please. Is there some more?

A. The other side.

Q. Read that, please.

A. The following persons may know the whereabouts of the delinquent: (I am reading parts filled in by our office) Karl Drager, Attorney, Box 484, Anchorage, Alaska, Oscar Olson, U. S. Deputy Marshal, Anchorage, Alaska. Documents as indicated are transmitted with original of this report: Order to Report for Induction, Form 150 (that is the only one that is checked. The others are left blank.”)

Witness continuing: That is all that is filled in by this office. It is signed by me. As a matter of fact, this is a copy. My signature is on there, but it is a copy. The original went to the District Attorney's office. It is addressed to Mr. Wennblom, United States Attorney, and this is a copy we hold in our files. It states, referring to the section numbered “3” at the bottom of the first page, that the delinquent has been located at Palmer, Alaska. The paragraph I read on the reverse side states that the following persons may know the whereabouts of the delinquent. Listed under that paragraph is Oscar Olson, United States Deputy Mar-



(Testimony of Louise Annabel.)

shal. The date on which he was to have reported was on the 30th of October at 8:00 o'clock A. M. The date of this is October 30, 1944. I remember having a phone call from you (Mr. Drager) in reference [61] to Mr. Fannon's failure to report. I remember that at the time you called and reported to me that he was in the hospital at Palmer, that I replied to you that we already knew that. I made a report of this delinquent to the Kelso board. The regulations provide that we Local Board No. 1 of Anchorage make the report of delinquency to the district attorney. This DSS Form 550 I have just read is the report we made. My understanding is that immediately this report goes to the district attorney, we then lose jurisdiction of the registrant, that the matter is in the hands of the district attorney, and is out of our hands. There is no recommendation as to procedure from our office, as to what should be done, to the district attorney's office. We knew that Mr. Fannon was in the hospital at Palmer from communicating with the hospital at Palmer and they verified it. The doctor said he was ill, that there was something the matter with him, but as yet he hadn't determined what the trouble was. He hadn't operated at that time on the defendant here. I talked to the doctor personally. I did not have any communication with a colonel of the Medical Corps at the Fort in connection with Mr. Fannon about that time in connection with his illness or his failure to report. I talked to I believe it was a Captain Leshner. He is a medical officer.



(Testimony of Louise Annabel.)

There was a conversation on the subject of his (Fannon's) being ill and in the hospital. The information came from me. I do not know if he made any investigation at all.

### Redirect Examination

By Mr. Plummer:

(File handed to the witness.)

Witness continuing: I have before me what purports to be a memorandum of a telephone conversation which I had with doctor—Captain Leshner on October 30, 1944. Captain [62] Leshner told me that inasmuch as the registrant John Fannon was an inductee, he could be removed, or rather he would be accepted at Fort Richardson and held there under observation for the determining of his condition.

### Recross Examination

By Mr. Badger:

I did not communicate that information to Mr. Fannon or to any of his representatives.

M. E. S. BRUNELLE

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Plummer:

My name is M. E. S. Brunelle. I am the Clerk of the District Court for the Third Division, Territory of Alaska. The document which is handed me is the original transcript of the proceedings in the United States Commissioner's Court here at Anchorage.

(It is stipulated by the parties that the preliminary hearing, which resulted in the defendant's being held over to the grand jury, which resulted in the indictment in this case, was held in the United States Commissioner's Court at Anchorage on the 16th of January, 1945.)

Mr. Drager: If the Court please, I have a witness, a doctor, I didn't wish to bring in here and wait. It would only take a few minutes to get him.

The Court: He might like to testify and be excused. How long will it take to put on the doctor's testimony?

Mr. Drager: I don't have him here but he would be available in a few minutes, unless you would like to adjourn.

The Court: I haven't any particular desire to do anything except speed up the trial. [63]

Mr. Drager: I will call Mr. Plummer.

Whereupon the plaintiff, the United States, rested its case, and thereupon

RAYMOND E. PLUMMER,

a witness called on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Drager:

My name is Raymond E. Plummer. I am Assistant District Attorney for the Third Division of Alaska. Mr. Wennblom is District Attorney. I believe that Mr. Wennblom was in the office on October 30, 1944. As I recall, this matter was referred to Mr. Wennblom at that time. I finally signed the complaint. As I recall it, the matter was referred to Mr. Wennblom and there was some discussion as to whether or not action would be taken at that time. As I remember, he stated that the matter would be held in abeyance until Mr. Fannon got out of the hospital to see whether or not he reported at that time to the draft board. I don't believe the regulations provide for any effort being made to contact Mr. Fannon or any of his representatives on order to show cause or anything of that kind. There wasn't anything done to my knowledge in the way of contacting him.

Mr. Drager: The defense rests.

The Court: You spoke of another witness?

Mr. Drager: I am unable to obtain him, if the Court please, and I didn't have a subpoena issued. He is a very busy man. I believe the matter for

which I wished to call him was covered to some considerable extent already.

The Court: Very well. [64]

Mr. Plummer: If the Court please, and if it is agreeable with the members of the jury and counsel for the defense, I would prefer to wait, to set it over until morning; however, I will abide by the Court's rule.

Mr. Drager: If the Court please, if the hearing is to go over to the morning, I would like to reserve the right to call Dr. McKenzie.

The Court: Very well. Court will now adjourn and the trial will be continued until tomorrow morning at 10:00 o'clock.

At 10:00 o'clock a. m., the following day, April 10, 1945, court was convened and the following proceedings were had:

Mr. Drager: If the Court please, I will not call the other witness.

The defense rests.

Whereupon both plaintiff and defendant having rested and the case having been argued by respective counsel, the court instructed the jury as follows:

### “INSTRUCTIONS TO THE JURY

“Ladies and Gentlemen of the Jury:

“It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations and disposition of this case.

When you were accepted as jurors in this case you obligated yourselves, by your oath, to try well and truly the matters at issue between the Government of the United States and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be a careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even [65] though you may think that the law should be otherwise. But it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in the verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

“John Fannon, the defendant in this case, is accused by the Grand Jury of this Division of violation of the Selective Training and Service Act of 1940, as amended, in that he wilfully, feloniously, knowingly and unlawfully failed and neglected to report at Fort Richardson, Alaska for induction.

“You will have the indictment with you in the jury room and may examine the same in detail.

“This indictment is a mere allegation of the charge against the defendant and is not in itself any evidence of guilt, and no juror should permit himself or herself to be influenced against the de-



fendant because an indictment has been rendered against him.

“To this indictment the defendant has pleaded not guilty, which plea is a denial of the charge, and puts in issue every material allegation of the indictment.

“It therefore becomes the duty, and it is incumbent upon the Government to prove every material element of the charge contained in the indictment to your satisfaction beyond a reasonable doubt.

“I instruct you that the essential elements which the Government must prove of the charge charged in the indictment are: [66]

“First: That the said violation occurred within the jurisdiction of this court;

“Second: That said violation occurred on or about the 30th day of October, 1944, or within three years before the finding of the indictment herein.

“Third: That the defendant failed and neglected to report for induction, as set forth in the indictment;

“Fourth: That the defendant did so wilfully, knowingly, feloniously and unlawfully.

“If the Government has proved each and all of these essential elements to your satisfaction, beyond a reasonable doubt, you will find the defendant guilty as charged in the indictment; if not, you should acquit him.

“I instruct you that:

“The word ‘wilfully’ means intentionally and not accidentally.

“The word ‘feloniously’ means purposely and unlawfully.

“The word ‘unlawfully’ means illegally or wrongfully.

“The word ‘knowingly’ needs no definition; it defines itself.

“You will observe that the indictment charges the defendant to have committed the crime set out in the indictment ‘wilfully’ and ‘knowingly’. These words are to be given full force and effect by you because they are a material part of the indictment. If one does a thing wilfully and knowingly, he does it not only with knowledge and understanding of what he is doing, but also intentionally; and one who commits a criminal act wilfully and knowingly understands and knows the nature of the crime he is committing and he commits it with criminal intent. An accidental or inadvertent violation of the law can be done neither knowingly nor wilfully. [67]

“So, in this case, to warrant conviction, it is necessary for you to find beyond a reasonable doubt that the defendant failed and neglected to report for induction, as set out in the indictment and under the circumstances therein stated, and that he so failed and neglected with knowledge and understanding of the nature of his act and with criminal intent to avoid compliance with the law concerning such induction.

“A reasonable doubt is a doubt which is reasonable in view of all of the evidence, and such as arises upon an impartial comparison and consideration of all of it, or from lack of evidence, and pre-

vents the jury from being able candidly and truthfully to say that they have an abiding conviction of the defendant's guilt.

“The very use of the word ‘reasonable’ in the term ‘reasonable doubt’ indicates that by a reasonable doubt is not meant any vague, formless, or imaginary doubt or conjecture which may come into your minds, or which may be created out of sympathy for the accused or another, or out of kindness of heart.

“A reasonable doubt must be a substantial doubt, such as an honest, sensible, fairminded person, animated by a conscientious desire to ascertain the truth, may with reason entertain.

“If, after examining carefully all the facts and circumstances in the case, in the light of the law as stated by the Court, you have a settled and abiding conviction of the guilt of the defendant, then you are satisfied of guilt beyond a reasonable doubt; but if you do not have such a conviction of the defendant's guilt, then you should acquit.

“The law presumes every person charged with crime to be innocent. [68]

“This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendant is guilty beyond a reasonable doubt.

“This rule, as to the presumption of innocence, is a humane provision of the law, intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of any

person who is in fact guilty, or to aid the guilty to escape punishment.

“The laws of Alaska provide that all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although the jury have the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you believe to be errors of law upon the part of the Court.

“All questions of fact, other than those heretofore mentioned in these instructions, must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

“You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in [69] the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any one of the parties to the case; the probability or improbability of the statements of



such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

“You are instructed that under the laws of Alaska, the accused shall, at his own request but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury under the instructions of the Court, but that his waiver of such right shall not create any presumption against him.

“The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

“However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

“You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

“A witness wilfully false in one part of his testimony may be distrusted in others.

“Testimony of the oral admissions of a party should be viewed with caution.

“Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and



of the other [70] to contradict, and, therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

“The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

“While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

“No juror should hesitate to change the opinion he has entertained or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty.

“You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions.

“As you have been heretofore instructed, your

duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the [71] Court in these instructions.

“During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

“Upon retiring to your jury room you will elect one of your number foreman, who is to speak for you and sign the verdict unanimously agreed upon.

“In conformity with law, I now hand you the instructions which I have just read to you for your guidance, the pleadings, the exhibits, with the exception of a part of plaintiff’s exhibit No. 1 not relevant to any issue in the case now on trial, and form of verdict.

“If you find the defendant guilty as charged in the indictment, you will draw a line in the blank space before the word ‘guilty’ and have your foreman sign the verdict. If you find the defendant not guilty you will write the word ‘not’ in the blank space before the word ‘guilty’ and have your foreman sign the verdict.

“When you have unanimously agreed upon a verdict and your foreman has signed the same, you will return such verdict into court, together with the exhibits, pleadings and these instructions.

“Dated at Anchorage, Alaska, this 10th day of April, 1945.

/s/ ANTHONY J. DIMOND  
District Judge” [72]

At the time of instructing the jury as aforesaid the Court refused to give the following instruction requested by the defendant, to-wit:

“A criminal intent, as explained in these instructions, is always necessary to constitute a crime, and when such criminal intention does not appear, from all the facts and circumstances proved on the trial, then the act complained of cannot be deemed a crime. Misadventure or accident, when the circumstances rebut the presumption of criminal intention and of criminal negligence, as explained in these instructions, are not deemed, in law, criminal, however injuriously they may affect persons or property. And, in this case, the matter of intent is an essential element of the offense charged, which the government must prove to the satisfaction of the jury beyond a reasonable doubt, and if the evidence fails to establish, beyond a reasonable doubt, that the defendant was able to report for induction and failed and neglected to do so, with the intent to wilfully evade or avoid induction, it will be the duty of the jury to acquit the defendant.

“In considering the matter of intent, it is competent for the jury to consider all of the facts in connection therewith, including the physical ability of the defendant to report or not to report, his effort or lack of effort to inform his Draft Board

of his whereabouts, and, having considered all of these things, to authorize a conviction, the facts and circumstances must not only all be in harmony with the guilt of the accused, but they must be of such character as to be inconsistent with his innocence and consistent with a wilful intent" to which ruling the defendant excepted and the exception was allowed. [73]

Immediately after the rendition of the instructions as aforesaid and in the presence of the jury and before they retired, the defendant took the following exceptions to the instructions of the Court as set forth in the Memorandum of Exceptions filed herein as follows:

#### “MEMORANDUM OF EXCEPTIONS

“I object to the failure of the Court to include the instruction on criminal intent, on the grounds that I believe it is necessary to explain, in language more understandable to the lay person, what is meant in law as a matter of intent—criminal intent; that in view of the nature of the evidence and the case at bar it is necessary that a special instruction be given that the jury may have full understanding of criminal intent and the words, knowingly and wilfully, as bearing thereon.

“I object to the instruction offered which commences with the sentence: ‘You will observe that the indictment charges the defendant to have committed the crime set out in the indictment “wilfully and knowingly”. \* \* \*’ in that it does not cover the matter of intent in such language as to



make clear to the jury the proper explanation of criminal intent.

“The foregoing exceptions to instructions were taken in open court by Karl A. Drager, Esq., attorney for defendant, in the presence of the jury and before the jury retired to consider further their verdict.

“The exceptions are allowed and the requested instruction will be filed and marked, Defendant’s Requested Instruction No. 1. The request to give this instruction is refused because it is the Court’s belief that the subject matter is otherwise covered.

“Dated, at Anchorage, Alaska, this 10th day of April, 1945.

/s/ ANTHONY J. DIMOND  
District Judge”

And thereafter on the 10th day of April, 1945, the jury returned their verdict in which they found the defendant guilty as charged in the indictment with a recommendation for leniency. [74]

And thereafter on the 14th day of April, 1945, the defendant filed a Motion for New Trial on the grounds of insufficiency of the evidence to justify the verdict, and error in law occurring at the trial and excepted to by the defendant.

And thereafter on the 1st day of May, 1945, by leave of court duly had and obtained, the defendant filed his Amended Motion for New Trial with affidavit of Karl A. Drager, attorney for the defendant, in support thereof, said motion and affidavit being as follows:



“AMENDED MOTION FOR NEW TRIAL

“Comes now the defendant in the above entitled action and moves the Court to set aside and vacate the verdict of the jury in this action, and grant a new trial, for the following reasons:

“1. Insufficiency of the evidence to justify the verdict.

“2. Error in law occurring at the trial and excepted to by the defendant.

“3. Newly discovered evidence material for the defendant, which he could not with reasonable diligence, have discovered and produced at the trial.

“Dated this 27th day of April, 1945.

“/s/ KARL A. DRAGER

“Attorney for Defendant”

“AFFIDAVIT IN SUPPORT OF AMENDED  
MOTION FOR NEW TRIAL

“United States of America,

“Territory of Alaska—ss.

“Comes now Karl A. Drager, Esq., who being first duly sworn, upon oath deposes and says:

“That he is counsel for the defendant, John Fannon, [75] and that he makes this affidavit in support of the Amended Motion for a New Trial, and further states that it was disclosed at the trial that telephonic conversations were had between the physician and surgeon who performed the operation at Palmer, and the Army Officers and local

Draft Board officials, but it was not disclosed, nor was it known to defendant and his counsel, that conversations were had between the physician and surgeon at Palmer, and the Medical Officer, Lt. Col. Albrecht, in charge of inductees at the Army Post. Affiant is informed, and believes, and upon such information and belief alleges, that the hereinbefore mentioned conversations were to the effect that after the preliminary inquiries between the doctors, that defendant's physician inquired if it was desired that the defendant be transferred to a Military Reservation and he was instructed by the Army Medical Officer that it would not be necessary to make the transfer and that he was to continue the treatments at the Palmer Hospital.

“Affiant further states that in view of the circumstances that this evidence is material for the defendant and that a trial without such evidence would be to the prejudice of the defendant.

“/s/ KARL A. DRAGER

“Subscribed and sworn to before me, a Notary Public at Anchorage, Alaska, this 27th day of April, 1945.

“/s/ MARY E. MOMINEE

“Notary Public for Alaska”

And thereafter on the 28th day of May, 1945, the Court denied the said Amended Motion for a New Trial, to which ruling the defendant excepted and the exception was allowed. [76]

And thereafter on the 8th day of June, 1945, the

defendant, by his attorney, George B. Grigsby, filed a Motion for New Trial and affidavit in support thereof, which motion and affidavit were as follows:

“MOTION FOR NEW TRIAL

“Comes now the defendant in the above entitled action and moves the Court that the verdict of the jury heretofore rendered in this action be set aside and a new trial granted upon the following grounds:

“Newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial.

“This motion is based upon the records and files herein and upon the affidavit of John Fannon, defendant herein, filed herewith.

“/s/ GEORGE B. GRIGSBY

“Attorney for Defendant”

“Service admitted June 8, 1945.

“/s/ RAYMOND E. PLUMMER

“Asst. United States Attorney”

“AFFIDAVIT IN SUPPORT OF MOTION  
FOR NEW TRIAL

“United States of America,

“Territory of Alaska—ss.

“John Fannon, being first duly sworn, deposes and says:

“That he is the defendant in the above entitled action. That he is charged by the indictment herein of neglecting to perform a duty required of him

under the provisions of the Selective Training and Service Act of 1940, as amended, and the rules and regulations made and directions given thereunder, and in particular with having, after being ordered by Local Selective Service Board No. 1, of Anchorage, Alaska, [77] to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, failed so to do.

“That affiant was at Palmer, Alaska, on October 27, 1944, and that on said date he was seized with a severe inflammation in the abdomen and was examined by Dr. David Hoehn, a physician and surgeon of Palmer, Alaska. That on account of the severity of the attack said physician was unable to diagnose his case with certainty, gave him some medicine, and arrangements were made for subsequent and further examination and treatment. That later, on said date, affiant drove to Anchorage, Alaska, to attend to business matters, and that on October 29, 1944, being Sunday, affiant returned to Palmer, Alaska, entered the hospital at that place, and was in said hospital on Monday, October 30, 1944, the day and date on which he was ordered to report for induction as above stated. That he underwent an operation for appendicitis on Tuesday, October 31, 1944.

“That since the trial of said action affiant has learned through his attorney, Karl Drager, now deceased, and from recent conversation with the said Dr. David Hoehn, that on the 30th day of October, 1944, an Army medical officer at Fort Richardson called Dr. Hoehn by telephone and that



a conversation ensued between said Army medical officer and Dr. Hoehn in which the said Army medical officer at Fort Richardson instructed Dr. Hoehn to continue his treatment of affiant at the said Palmer, Alaska, hospital and not to cause the transfer of affiant to the Fort Richardson military reservation, and stating at that time that it was not necessary for affiant to report for induction on the day set therefor, to-wit, October 30, 1944, nor for ninety days thereafter. That thereafter affiant was operated upon as above stated. [78]

“That to affiant’s best recollection he was not informed of the above facts relating to said telephone conversation at the time the same occurred, nor thereafter while at the Palmer hospital, nor until after his trial, as above stated, nor was his attorney, Karl Drager, so informed. That on a new trial of this action affiant will be able to prove the facts relating to said telephone conversation, and that affiant is informed by his attorney, George B. Grigsby, that said facts are material to his defense.

“Affiant further states that he is informed and believes, that the Army medical officer who engaged in said telephone conversation is Captain Sidney Leschner; that his attorney, George B. Grigsby, within the past three days, had a conversation with Colonel Albrecht, an Army medical officer at Fort Richardson, in which conversation the said Colonel Albrecht informed affiant’s said attorney that he was cognizant of a conversation engaged in by an Army medical officer at Fort Richardson, about



October 30, 1944, relating to the matters hereinabove set forth, and that he, the said Colonel Albrecht, believed that said conversation was between the Captain Sidney Leschner and the doctor at the Palmer hospital; that the said Captain Leschner was the induction officer at Fort Richardson at said time and had authority in the premises.

“/s/ JOHN FANNON

“Subscribed and sworn to before me this 8th day of June, 1945.

“/s/ GEORGE B. GRIGSBY

“Notary Public for Alaska

“My commission expires 5-14-1947.

“Service admitted June 8, 1945.

“/s/ RAYMOND E. PLUMMER

“Asst. United States Attorney” [79]

And thereafter on the 11th day of June, 1945, the Court having heard the arguments of counsel on said motion for a new trial denied the motion, to which ruling defendant excepted and the exception was allowed.

Thereafter on the 12th day of June, 1945, the Court pronounced sentence against the defendant, whereby the defendant was sentenced to be imprisoned in the Federal Jail at Anchorage, Alaska, for the term of one year, and to pay a fine of \$2,000.00 and stand committed until said sentence is executed; and that upon his failure to pay the fine

imposed, he be imprisoned in the Federal jail at Anchorage, Alaska, one day for each \$2.00 thereof, which said judgment and sentence was thereafter reduced to writing and signed by the Judge of the Court on the 27th day of June, 1945.

And thereafter on the 23rd day of June, 1945, an order was made in open court and entered in the court journal, said order being as follows:

“No. 1848 Cr.

M. O. EXTENDING TIME TO FILE  
BILL OF EXCEPTIONS

“Now at this time, on oral motion of George B. Grigsby, Esq., counsel for the defendant in cause No. 1848 Cr., entitled United States of America, plaintiff, vs. John Fannon, defendant.

“It Is Ordered that the appellant shall have sixty (60) days in which to procure to be settled and filed with the Clerk of the Court a bill of exceptions in said cause.

“Entered Court Journal No. G10, Page No. 423, June 23, 1945.” [80]

## PLAINTIFF'S EXHIBIT No. 2

Selective Service System

Transfer

Preinduction Physical Examination

Application

Transfer by Order of the State Director

Date July 25, 1944.

Name (First) John (Last) Fannon (Order No.)  
2253.

Present address 428 East 4th Ave., Anchorage,  
Alaska.

I present herewith my Order to Report: Preinduction Physical Examination (Form 215) issued by Local Board 1, Kelso, Wash. Reason for absence from my own Local Board area:

I respectfully request that I be transferred for preinduction physical examination to the Local Board having jurisdiction over my present address given above.

If I am found qualified for service and ordered to report for induction, I request that I be inducted from:

—The Local Board with which this application is filed.

Request for Transfer for Delivery (Form 154) is attached.

—My own Local Board.

.....  
(Signature of registrant)

DSS Form 216

(On back)

FIRST ENDORSEMENT

Local Board No. 1      02

005

Aug 15 1944

001

Anchorage Alaska

(Local Board of Transfer Date

Stamp With Code)

Date 8-11, 1944

This request for transfer for preinduction physical examination is approved.

The registrant has requested transfer for induction.

Request for Transfer for Delivery (Form 154) is attached.

The registrant has requested that he be inducted at his own Local Board.

/s/ LOUISE ANNABEL,

(Member or clerk, Local  
Board)

## SECOND ENDORSEMENT

Local Board No. 1      97

Cowlitz County      015

Jul 25 1944      001

Post Office Building

Kelso, Washington

(Registrant's Own Local Board

Date Stamp with Code)

Date July 25, 1944

This registrant is hereby transferred for preinduction physical examination.

Attached:

XX Original and all copies of Report of Physical Examination and Induction (Form 221).

— Other information which should be forwarded to the induction station for consideration when giving registrant preinduction physical examination.

/s/ RUTH ANDERSON,

(Asst. clerk, registrant's own  
Local Board)



PLAINTIFF'S EXHIBIT No. 3

Selective Service System

Order to Report

Preinduction Physical Examination

(Date of mailing) 11 August, 1944

Local Board No 1      02

Aug 11 1944              005

001

Anchorage Alaska

(Local Board Date Stamp With Code)

The President of the United States,

To (First Name) John (Last Name) Fannon,  
(Order No.) 2253.

Greeting:

You are hereby directed to report for preinduction physical examination at Room 128 Federal Bldg., Anchorage, Alaska, at 8 a. m., on the 23d of August, 1944.

/s/ LOUISE ANNABEL,

(Clerk of the Local Board)

IMPORTANT NOTICE TO REGISTRANT

Registrant who believes he has a disqualifying defect.—If you believe that you have some defect which will disqualify you for service you may, on or before the ..... day of ....., 194..., appear in person at the office of the Local Board, or, if you are unable by reason of such defect to

personally appear, you may submit an affidavit from a reputable physician or an official statement by an authorized representative of a Federal or State agency to the effect that such physician has personal professional knowledge or such authorized representative has official knowledge of your defect, the character thereof, and that you are unable to personally appear due to the character of the defect. The Local Board may send you to the Local Board examining physician, and, if it does so, it shall be your duty to appear at the time and place designated by the Local Board and to submit to such examination as the examining physician shall direct. If the Local Board determines that your defect does disqualify you for service you will receive a Notice of Classification (Form 57) advising you that you have been placed in Class IV-F. Unless prior to the date fixed for your pre-induction physical examination, you receive such a Notice of Classification (Form 57) advising you that you have been placed in Class IV-F, you must report for your pre-induction physical examination as directed.

Every registrant.—When you report for preinduction physical examination you will be forwarded to an induction station where you will be given a complete physical examination to determine whether you are physically fit for service. If you sign a Request for Immediate Induction (Form 219), and you are found qualified for service, you will be inducted immediately following the completion of your preinduction physical examina-

tion. Otherwise, upon completion of your preinduction physical examination, you will be returned to this Local Board. You will be furnished transportation and meals and lodgings when necessary. Following your preinduction physical examination you will receive a certificate issued by the commanding officer of the induction station showing your physical fitness for service or lack thereof.

If you fail to report for preinduction physical examination as directed, you will be delinquent and will be immediately ordered to report for induction into the armed forces. You will also be subject to fine and imprisonment under the provisions of section 11 of the Selective Training and Service Act of 1940, as amended.

If you are so far from your own Local Board that reporting in compliance with this order will be a hardship and you desire to report to the Local Board in the area in which you are now located, take this order and go immediately to that Local Board and make written request for transfer for preinduction physical examination.

DSS Form 215

## PLAINTIFF'S EXHIBIT No. 4

Local Board No. 1 97

Cowlitz County 015

Jul. 24 1944 001

Post Office Building

Kelso, Washington

Local Board No. 1 97

Cowlitz County 015

Sep 20 1944 001

Post Office Building

Kelso, Washington

(Local Board date stamp with code)

## CERTIFICATE OF FITNESS

(First Name) John, (Middle Name) none, (Last Name) Fannon, (Order No.) 2253.

The above-named registrant having been given a Preinduction Physical Examination was found:

1. X Physically fit, acceptable for general military service.

2. — Physically fit, acceptable for limited military service.

3. — (Crossed out)

4. — Rejected, physically unfit.

5. — Rejected, physically fit but unacceptable for other reasons.

(Date of examination) 25 Aug 1944

Name /s/

ODD A. LUND,

Induction Station Commander.

Rank Odd A. Lund, Flt. CAC

Station APO 942, U. S. Army

STATUS NOT DETERMINED

6. — Status not determined because serology is not satisfactory. The Local Board is requested to require the registrant to submit to further serological tests in order to determine whether his serology is definitely positive or definitely negative. In order that the armed forces may determine his acceptability, the results of such tests will be mailed to the Induction Station together with DSS Form 221 and other records originally forwarded. [84]

7. — Status not determined because of incomplete records. The Local Board is requested to secure and mail to the Induction Station the records listed below, in order that the armed forces may determine the registrant's acceptability. Such records will be mailed to the Induction Station together with registrant's DSS Form 221 and other records originally forwarded.

Records required:

.....  
.....

REQUEST TO VERIFY SEROLOGY OF  
ACCEPTED REGISTRANT

8. — The above-named registrant was found to be acceptable as indicated in Item 1, 2, or 3 above, but his serology was positive. The Local Board is, therefore, requested to require the registrant to submit to further serological tests in order to determine whether his serology is definitely positive or definitely negative; the results of such tests to



be transmitted with the registrant when he is forwarded for induction.

Name.....

Induction Station Com-  
mander

Rank.....

Station.....

DSS Form 218

### PLAINTIFF'S EXHIBIT No. 5

Local Board No. 1      97

Cowlitz County      015

Sep 26 1944      001

Post Office Building

Kelso, Washington

(Local Board Date Stamp With Code)

(Date of mailing): Sept. 26, 1944.

### ORDER TO REPORT FOR INDUCTION

The President of the United States,  
To John Fannon, Order No. 2253.

#### Greeting:

Having submitted yourself to a local board composed of your neighbors for the purpose of determining your availability for training and service in the land or naval forces of the United States, you are hereby notified that you have now been selected for training and service therein. [85]

You will, therefore, report to the local board named above at Local Board Office, Kelso, Wash. at 8: a. m. on the 12th day of October, 1944.

This local board will furnish transportation to an induction station. You will there be examined, and, if accepted for training and service, you will then be inducted into the land or naval forces.

Persons reporting to the induction station in some instances may be rejected for physical or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

Willful failure to report promptly to this local board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940, as amended, and subjects the violator to fine and imprisonment.

If you are so far removed from your own local board that reporting in compliance with this order will be a serious hardship and you desire to report to a local board in the area of which you are now located, go immediately to that local board and make written request for transfer of your delivery for induction, taking this order with you.

/s/ AVIS BENSON

Clerk of the local board.

D.S.S. Form 150

(Revised 1-15-43)

## PLAINTIFF'S EXHIBIT No. 6

Transfer by Order of the State Director  
 REQUEST FOR TRANSFER FOR DELIVERY  
 To Local Board:

(First Name) John, (Last Name) Fannon, (Order No.) 2253.

Present address c/o Karl Drager, Anchorage, Alaska, which is in the area of the Local Board with which this application is filed.

Registrant's own Local Board 1 Kelso, Washington.

Reasons for absence from my own Local Board area: Living in Alaska.

I request that I be transferred for delivery to your Local Board.

.....

(Signature of registrant)

## FIRST ENDORSEMENT

Local Board No. 1      02

005

Oct 27 1944      001

Anchorage, Alaska

(Local Board Date Stamp with Code)

The above request: Approved X

/s/ E. LIVINGSTON

Clerk of Local Board of  
 Transfer

SECOND ENDORSEMENT

Local Board No. 1      97

Cowlitz County      015

Sep      001

Post Office Building

Kelso, Washington

(Local Board Date Stamp with Code)

The above registrant is hereby transferred to  
your Local Board for delivery.

/s/ RUTH ANDERSON

Asst. Clerk of Registrant's

Local Board

DSS Form 154

(Rev. 1/10/44) [87]

The following are those letters, forms and documents included in plaintiff's Exhibit No. 1 and not heretofore appearing in this Bill of Exceptions, not having been read to the jury when plaintiff's Exhibit No. 1 was admitted in evidence, but which were submitted to the jury with the other exhibits in the case when the jury retired:

Local Board No. 1      02

Nov 6, 1944      005

001

Anchorage, Alaska

6 November, 1944

(Stamp)

Local Board No. 1 97

Cowlitz County 015

Nov 10 1944 001

Post Office Building

Kelso, Washington

Re: John Fannon

ON12253

Gentlemen:

Attached please find the DSS Form 550 on which your above-named registrant was reported to the United States Attorney when he failed to report for induction on 30 October, 1944.

This is forwarded to you so that you may report the delinquency on DSS Form 551, according to Selective Service regulations.

Very truly yours,

W. J. McDONALD,

Chairman, Local Board No. 1,

Anchorage, Alaska

By /s/ LOUISE ANNABEL

Clerk.

1 August, 1944

John Fannon

c/o Karl Drager

Anchorage, Alaska

re: Order No. 2253

Dear Sir:

We have your letter of 25 July, 1944 requesting postponement of induction and we wish to advise



that following your preinduction physical examination and before you are ordered [88] to report for active duty, local board will give consideration to your request and will advise you at that time.

Yours truly,

COWLITZ COUNTY LOCAL  
BOARD,

WALTER J. VITOUS,  
Chairman

By.....  
Clerk

AB:ra

Anchorage, Alaska  
May 10, 1944

Local Board No. 1, Cowlitz County 4-F  
Post Office Building  
Kelso, Washington

4-F

Gentlemen:

Re: John Fannon—Order No. 2253

In conformity with the requirements of the Selective Service Act, I do herewith make report of a change in my status, to-wit: my marital status has been changed in the following respect: A divorce was granted to my former wife and I have remarried. My present wife was a widow with a child, Dorothy Pickert, age 11 years, and we now reside at 428 East Fourth Avenue, Anchorage, Alaska.

As to my employment status, I am in a little

difficulty with the Civil Authorities and in custody of bail. I have made application for, and have been promised, upon my release from said custody, employment in the fishing industry for the fishing season, either in this vicinity or in the vicinity of Bristol Bay.

However, my address will remain unchanged and proper provisions will be made for forwarding or contacting.

Very truly yours,  
/s/ JOHN FANNON

(Stamp)

Local Board No. 1      97

Cowlitz County      015

May 22 1944      001

Post Office Building

Kelso, Washington [89]

115.1

(Stamp)

Local Board No. 1      97

Cowlitz County      015

Oct. 25 1943      001

Post Office Building

Kelso, Washington

Mr. J. Charles Dennis

U. S. District Attorney's Office,

Seattle, Washington

Re: John Fannon

Order No. 2253

Dear Sir:

On June 19 1943, we reported the above-named registrant to you as a delinquent.

This registrant has now complied with Selective Service Regulations and may be released from the charge of delinquency reported on DS3 Form 279.

We wish to thank you for your assistance on this case.

Yours very truly,

COWLITZ COUNTY LOCAL  
BOARD

(Local Board Designation)

By: .....

(Clerk of Board)

cc Director of Selective Service

Camp Murray, Washington

Letter of Release to U. S. District Attorney—  
Prepare in Triplicate—Send 1 copy to District At-

torney; 1 copy to State Headquarters and 1 copy for file.

DSS Form 13

BOARD OF TRANSFER No. 1

Anchorage, Alaska

4-F

Date 12/30/43

Local Board No. 1

P. O. Bldg.

Kelso, Wash.

Re: John Fannon

ON-2253

Gentlemen:

This is to inform you that under the provisions of Part 663 of the Selective Service Regulations the above [90] captioned registrant of your local board has registered with this Board of Transfer No. 1. Any current information received relevant to the registrant's classification shall be forwarded to your local board.

He has given as his present address: Box 484, Anchorage, Alaska.

Very truly yours,

/s/ LOUISE ANNABEL,

Clerk, Board of Transfer

No. 1

(Stamp)

Local Board No. 1      97

Cowlitz County      015

Jan 11, 1944      001

Post Office Building

Kelso, Washington

(Envelope)

Selective Service      Kelso

Local Board No. 1      97      May 28

Cowlitz County      015      7:30 PM (Stamp)

May 28 1943      001      1943

Post Office Building      Wash.

Kelso, Washington

(Stamp) Moved, Left No Address.

(Stamp)

Local Board No. 1

Cowlitz County

Jun 4 1943

Post Office Building

Kelso, Washington

Not here—Gone to Alaska.

John Fannon

Lansing Hotel

Tacoma, Washington      Address unknown

(Stamp) Tacoma June 3 12:30 PM 1943

June 2, 1943



Local Board No. 1 97

Cowlitz County 015

May 28, 1943 001

Post Office Building

Kelso, Washington

(Local Board Date Stamp with Code)

(Date of mailing) May 28, 1943. [91]

**ORDER TO REPORT FOR INDUCTION**

The President of the United States,

To John Fannon, Order No. 2253.

**Greeting:**

Having submitted yourself to a local board composed of your neighbors for the purpose of determining your availability for training and service in the armed forces of the United States, you are hereby notified that you have now been selected for training and service in the Armed Forces.

You will, therefore, report to the local board named above at Kelso Post Office Building at 8:00 A. M., on the 7th day of June, 1943.

The local board will furnish transportation to an induction station of the service for which you have been selected. You will there be examined, and, if accepted for training and service, you will then be inducted into the stated branch of the service.

Persons reporting to the induction station in some instances may be rejected for physical or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hard-

ship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

Willful failure to report promptly to this local board at the hour and on the day named in this notice is a violation of the Selective Service Act of 1940, as amended, and subjects the violator to fine and imprisonment.

If you are so far removed from your own local board that reporting in compliance with this order will be a serious hardship and you desire to report to a local board in the area of which you are now located, go immediately to that local board and make written request for transfer of your delivery for induction, taking this order with you.

AVIS BENSON

Clerk of the local board

(Stamp)

Local Board No. 1      97

Cowlitz County      015

Jun 4 1943      001

Post Office Building

Kelso, Washington

D.S.S. Form 150

(Revised 7-13-42) [92]

Selective Service System  
 Local Board No. 1      97  
 Cowlitz County      015  
 May 1 1943      001  
 Post Office Building  
 Kelso, Washington  
 (Stamp of Local Board)

May 1, 1943

Director of Selective Service

State of Washington

Camp Murray, Washington

Re: DSS Form 281

Dear Sir:

The following-named registrant(s), reported to you on DSS Form 281 is (are) no longer delinquent:

Name of registrant: John Fannon.

Order Number: 2253.

Yours very truly,

COWLITZ COUNTY LOCAL  
 BOARD

By: .....

(Clerk of Board)

DSS Form 11

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The exhibits set forth referred to in the foregoing Bill of Exceptions are the only exhibits which went to the jury. Although the complete file of Local Board No. 1, Kelso, Washington, was admitted into evidence as plaintiff's exhibit No. 1, before the case went to the jury the trial judge examined the file and removed the exhibits which had

not been referred to during the trial and which were deemed irrelevant and immaterial to the trial of this cause. After this had been done by the trial judge counsel for both plaintiff and defendant examined the exhibits which were permitted to go to the jury and both counsel for the plaintiff and the defendant consented to such exhibits' being sent to the jury. [93]

The matters and things hereinabove in this Bill of Exceptions set forth not fully appearing of record, the said defendant John Fannon tenders and presents the foregoing as his Bill of Exceptions in said cause, and prays that the same be settled, allowed, signed and sealed and made a part of the record in said cause by this Court, pursuant to law in such cases.

Dated at Anchorage, Alaska, this 13th day of August, 1945.

/s/ GEORGE B. GRIGSBY,  
Atty. for Defendant.

Service admitted this 13th day of August, 1945.

RAYMOND E. PLUMMER,  
Assistant U. S. Attorney.

[Endorsed]: Filed Aug. 13, 1945.

Approved Bill of Exceptions filed in the District Court, Territory of Alaska, Third Division, Aug. 29, 1945.

M. E. S. BRUNELLE,  
Clerk.

By LOUISE ANNABEL,  
Deputy [94]

[Title of District Court and Cause.]

ORDER SETTLING, ALLOWING AND APPROVING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions having been filed and presented for settlement within the time allowed by law and the rules of Court, and having been examined by me and found to be a true and accurate statement of all the evidence introduced in the trial of the cause, and to contain a condensed narrative statement of the evidence in the cause, and to be true and correct, it is, therefore,

Ordered, that said Bill of Exceptions be, and the same hereby is, approved and settled as a bill of exceptions upon the appeal of the defendant to the United States Circuit Court of Appeals for the Ninth Circuit, and it is further

Ordered, that this order shall be deemed and taken as a certificate of the undersigned judge of this court who presided at the hearing of the said cause and before whom all the evidence in said cause was given, that the said bill of exceptions contains a condensed statement, all in narrative form except in several instances where the undersigned Judge has required that testimony and proceedings be given verbatim for a full understanding of the issues, of all the evidence given in said cause, including exhibits, upon which the verdict of the jury and judgment of the court are based. [95]



Done by the Court and ordered entered this  
29th day of August, 1945.

/s/ ANTHONY J. DIMOND,  
District Judge.

Entered Court Journal No. G 10, Page No. 551,  
Aug. 29, 1945.

[Endorsed]: Filed Aug. 29, 1945. [96]

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[Title of District Court and Cause.]

## ASSIGNMENT OF ERRORS

Now comes the defendant and appellant herein and files the following assignments of error upon which he will rely in the prosecution of his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment and sentence of this court pronounced on the 12th day of June, 1945, and signed and filed on the 27th day of June, 1945.

### I.

That the court erred in overruling the motion of the defendant for a new trial based upon the ground, among others, that there was insufficient evidence to justify the verdict, to which ruling the defendant duly excepted and the exception was allowed.

### II.

That the court erred in submitting the case to the jury, for the reason that there was not suffi-

cient evidence submitted to the jury to sustain a conviction, and no evidence whatever that the defendant did wilfully fail to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, as charged in the indictment.

### III.

That the court erred in the admission of certain [97] testimony of the witness Ruth V. Anderson, a witness called by the government, as follows.

The Witness: Referring to form D.S.S., dated June 14th, 1943, that is an official form of the department, Selective Service Form 281. This was the form that was mailed *that was mailed* to the registrant. (Witness reads paper) as follows: "June 14, 1943, to John Fannon, Order No. 2253, addressed to Lansing Hotel, Tacoma, Washington, The printed form is as follows: Dear Sir: According to information in possession of this local board, you have failed to perform the duty or duties, imposed upon you under the selective service law as specified below."——

Mr. Drager: I object on the ground that it is irrelevant and immaterial. It is too remote.

Mr. Plummer: You have availed yourself of letters dating back to August and September of 1943. I think the relevancy of this form is no more remote than those letters read in the previous examination by Mr. Drager.

Mr. Drager: I would like to know the purpose of it. I have a purpose in referring to the others. I can't see the purpose of this except to prejudice.

Mr. Plummer: May I state the purpose?

The Court: Yes.

Mr. Plummer: My purpose in having that read is that there are several other such forms in the file here, and it is my contention that the present charge is one of a series of events which are a part of a general scheme to evade the selective service law and I think that all delinquencies similar to the ones charged in this indictment are relevant to show it is a part of a scheme to evade the selective service law. [98]

The Court: I am not sure of that and the defendant hasn't been indicted for that; however the subject has already been opened up by part of an exhibit that was read at the instance of counsel for the defendant in a letter written by the defendant in which he referred to embarrassment he suffered by reason of failure to receive notice to report for induction and some legal action. This is part of the same subject and the subject is already before the jury. I shall admit it. Objection overruled and exception allowed. You may read it.

A. Commencing where I left off, the Notice of Delinquency. Failure to report for induction. You are therefore directed to report, by mail, telegraph, or in person, at your own expense, to this local board, on or before 9:00 P. M., on the 19th day of June, 1943. Failure to report on or before the day and hour mentioned is an offense punishable by fine or imprisonment or both.

Q. Will you turn to D.S.S. Form 281 dated April 10, 1943, and read that to the court and jury, please.

Mr. Drager: Same objection.

The Court: Same ruling. Objection overruled and exception allowed.

A. Notice of delinquency. April 10, 1943, to John Fannon, Order No. 2253, Lansing Hotel, Tacoma, Washington. The same form. Dear Sir: According to information in possession of this Local Board, you have failed to perform the duty or duties, imposed upon you under the selective service law as specified below. Failure to report for Physical examination. You are therefore directed to report by mail, telegraph, or in person, at your own expense, to this Local [99] Board, on or before 5:00 P. M. on the 15th day of April, 1943. Failure to report on or before the day and hour specified is an offense punishable by fine or imprisonment, or both. Clerk of Local Board.

#### IV.

That the court erred in refusing to instruct the jury as requested by the defendant as follows, which was requested by the defendant before the jury was instructed, and to which ruling the defendant excepted and the exception was allowed.

“A criminal intent, as explained in these instructions, is always necessary to constitute a crime, and when such criminal intention does not appear, from all the facts and circumstances proved on the trial, then the act complained of cannot be deemed a crime. Misadventure or accident, when the circumstances rebut the presumption of criminal intention and of criminal negligence, as explained in these



instructions, are not deemed, in law, criminal, however injuriously they may affect persons or property. And, in this case, the matter of intent is an essential element of the offense charged, which the government must prove to the satisfaction of the jury beyond a reasonable doubt, and if the evidence fails to establish, beyond a reasonable doubt, that the defendant was able to report for induction and failed and neglected to do so, with the intent to wilfully evade or avoid induction, it will be the duty of the jury to acquit the defendant.

“In considering the matter of intent, it is competent for the jury to consider all of the facts in connection therewith, including the physical ability of the defendant to report or not to report, his effort or lack of effort [100] to inform his Draft Board of his whereabouts, and, having considered all of these things, to authorize a conviction, the facts and circumstances must not only all be in harmony with the guilt of the accused, but they must be of such character as to be inconsistent with his innocence and consistent with a wilfull intent.”

## V.

That the court erred in instructing the jury as follows, to which instruction the defendant excepted in the presence of the jury and before they retired and which exception was allowed:

“You will observe that the indictment charges the defendant to have committed the crime set out in the indictment “wilfully” and “Knowingly.” These words are to be given full force and effect



by you because they are a material part of the indictment. If one does a thing wilfully and knowingly, he does it not only with knowledge and understanding of what he is doing, but also intentionally; and one who commits a criminal act wilfully and knowingly understands and knows the nature of the crime he is committing and he commits it with criminal intent. An accidental or inadvertent violation of the law can be done neither knowingly or wilfully.

So, in this case, to warrant conviction, it is necessary for you to find beyond a reasonable doubt that the defendant failed and neglected to report for induction, as set out in the indictment and under the circumstances therein stated, and that he so failed and neglected with knowledge and understanding of the nature of his act and with criminal intent to avoid compliance with the law concerning such induction.” [101]

The foregoing instruction was objected to by the defendant on the ground that it does not cover the matter of intent in such language as make clear to the jury the proper explanation of criminal intent, said objection being fully set forth in the Memorandum of Exceptions, which is incorporated into the Bill of Exceptions herein.

## VI.

That the court erred in giving the jury the following instruction:

“I instruct you that the essential elements which the government must prove of the charge charged in the indictment, are

First: That the said violation occurred within the jurisdiction of this court;

Second: That said violation occurred on or about the 30th day of October, 1944, or within three years before the finding of the indictment. \* \* \*

On the ground that the indictment charged the defendant with having failed to report on October 30th, 1944, not before or after that date, on the ground that time became and was an essential ingredient of the offense, and on the ground that evidence was admitted in the case of other delinquencies of the defendant under the theory that they showed a general scheme of evasion of the law, and that said instruction was misleading to the jury and might have influenced them to convict the defendant for offenses for which he was not on trial."

## VII.

That the court erred in admitting the following testimony of the government witness Louise Annabell: [102]

Q. (By Mr. Plummer): I would like to have this file handed to the witness on the stand. Calling your attention to the copy of a letter in your files which purports to be a memorandum of a telephone conversation which you had with Dr. Captain Leshner on October 30, 1944, do you have that before you? A. Yes sir.

Q. What did Dr. Leshner state relative to this defendant?

Mr. Drager: Object to the question as leading.

The Court: Objection overruled.

Mr. Drager: The letter hasn't been identified or introduced.

Q. Will you refer to it and state, if you can, what Captain Leshner said relative to Mr. Fannon during the course of that conversation?

Mr. Drager: She said she couldn't remember.

Q. Will you refresh your recollection from that letter?

A. Captain Leshner told me that inasmuch as the registrant John Fannon was an inductee he could be removed, or rather he would be accepted at Ft. Richardson and held there under observation for the determination of his condition.

The aforesaid testimony should have been excluded by the court of its own motion, as hearsay, and prejudicial to the defendant.

### VIII.

That the court erred and abused his discretion in overruling defendant's amended motion for a new trial, filed May 1st, 1945, to which ruling defendant excepted and the exception was allowed.

### IX.

That the court erred and abused his discretion in overruling defendant's motion for a new trial, filed June 8th, 1945, to which ruling defendant excepted and which exception was allowed. [103]

Wherefore, defendant and appellant prays that the judgment in the above entitled cause be reversed and the cause remanded, with instructions

to the trial court as to further proceedings therein and for such other and further relief as may be just in the premises.

/s/ GEORGE B. GRIGSBY

Attorney for Defendant and  
Appellant

Service admitted Sept. 1st, 1945.

/s/ RAYMOND E. PLUMMER

Assistant U. S. Attorney

[Endorsed]: Filed Sept. 1, 1945. [104]

---

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court, Third Division,  
Territory of Alaska:

You are hereby requested to make a transcript of record to.....filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above entitled cause, and to include in such transcript of record the following papers of record in said cause, to-wit:

1. Indictment.

2. Arraignment and Plea of Not Guilty (Court Minutes April 2nd, 1945).

3. Verdict.

4. Minute Order June 12th, 1945, Pronouncing Judgment and Sentence.
5. Notice of Appeal (Filed June 16th, 1945).
6. Minute Order June 23rd, 1945, fixing time for settlement of Bill of Exceptions.
7. Judgment and Sentence (Filed June 27th, 1945).
8. Bill of Exceptions.
9. Assignments of Error.
10. This Praecipe.
11. Clerk's Certificate to Transcript.

Respectfully,

/s/ GEORGE B. GRIGSBY

Attorney for Appellant

Service Admitted Sept. 11th, 1945.

/s/ RAYMOND E. PLUMMER

Assistant U. S. Attorney

[Endorsed]: Filed Sept. 11, 1945. [105]

---

[Title of District Court and Cause.]

To the Clerk of the District Court, Third Division,  
Territory of Alaska:

The defendant in the above entitled action objects to the inclusion in the Transcript of Record on Appeal, the transcript of the bind-over proceedings in the United States Commissioner's Court for the



Precinct of Anchorage, Third Division, Territory of Alaska, as called for in the Praecept of the United States Attorney for said Division, on the ground that said transcript of said United States Commissioners is not a part of the record in the above entitled action.

Dated: September 24, 1945.

/s/ GEORGE B. GRIGSBY

Attorney for Defendant and  
Appellant

[Endorsed]: Filed Sept. 24, 1945. [106]

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[Title of District Court and Cause.]

AMENDED COUNTER-PRAECIPE FOR  
TRANSCRIPT OF RECORD

To the Clerk of the District Court, Third Division,  
Territory of Alaska:

You are hereby requested to make, certify, and transmit a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, and to include in such transcript of record the following papers of record in said cause, to-wit:

(1) Entire transcript of proceedings before the United States Commissioner.

(2) Minute Order Setting Time for Arraignment (entered March 28, 1945).

(3) Minute Order Setting Cause for Trial (entered April 3, 1945).

(4) Journal Entry regarding Trial by Jury, dated April 9, 1945, Entered Court Journal No. G10, Page No. 161.

(5) Journal Entry regarding Trial by Jury, dated April 9, 1945, Entered Court Journal No. G10, Page No. 163.

(6) Journal Entry regarding Trial by Jury, dated April 10, 1945, Entered Court Journal No. G10, Page No. 166.

(7) Journal Entry regarding Trial by Jury, dated April 10, 1945, Entered Court Journal No. G10, Page No. 166. [107]

(8) This Amended Counter-Praecipe for Transcript of Record.

(9) Clerk of the Court's certificate of transcript.

Dated at Anchorage, Alaska, this 28th day of September, 1945.

/s/ RAYMOND E. PLUMMER  
Assistant United States Attorney, Anchorage,  
Alaska, Attorney for Plaintiff-Appellee.

Service acknowledged by receipt of a copy of the above and foregoing Counter-Praecipe for Transcript of Record this 28th day of September, 1945.

/s/ GEORGE B. GRIGSBY  
Attorney for Defendant-Appellant

[Endorsed]: Filed Sept. 28, 1945. [108]

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD

United States of America,

Territory of Alaska, Third Division—ss:

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 108 pages, numbered from 1 to 108, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the praecipe filed in my office on the 11th day of September, 1945; and the amended counter-praecipe filed in my office on the 28th day of September, 1945; that the foregoing transcript has been prepared, examined and certified by me, and that the costs thereof, amounting to \$35.55 has been paid to me by George B. Grigsby, counsel for the appellant herein.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court this 28th day of September, 1945.

[Seal] M. E. S. BRUNELLE  
Clerk of the District Court, Territory of Alaska,  
Third Division.

[Endorsed]: No. 11107. United States Circuit Court of Appeals for the Ninth Circuit. John Fannon, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court for the Territory of Alaska, Third Division.

Filed October 16, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 11,107

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

---

JOHN FANNON,

*Appellant,*

VS.

THE UNITED STATES OF AMERICA,

*Appellee.*

Upon Appeal from the District Court for the  
Territory of Alaska, Third Division.

BRIEF FOR APPELLANT.

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GEORGE B. GRIGSBY,

Anchorage, Alaska,

*Attorney for Appellant.*

E. COKE HILL,

Hobart Building, San Francisco, California,

*Of Counsel.*

FILED

FEB 20 1946

PAUL P. O'BRIEN,  
CLERK





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No. 11,107

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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JOHN FANNON,

*Appellant,*

VS.

THE UNITED STATES OF AMERICA,

*Appellee.*

---

Upon Appeal from the District Court for the  
Territory of Alaska, Third Division.

## BRIEF FOR APPELLANT.

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### JURISDICTIONAL STATEMENT.

The appellant, John Fannon, was indicted on the 23rd day of March, 1945, by a Grand Jury of the District Court of the Third Division of the Territory of Alaska, on a charge of knowingly failing and neglecting to perform a duty required of him under the provisions of the "Selective Training and Service Act of 1940, as amended" and the rules and regulations made and directions given thereunder. The regulation which the defendant and appellant was charged with having violated was section 633.21 of the Selective Service Regulations, which is as follows:

"633.21 DUTY OF REGISTRANT TO REPORT FOR AND  
SUBMIT TO INDUCTION. (a) When the local board

mails to a registrant an Order to Report for Induction (Form 150), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuous duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuous duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

(b) Upon reporting for induction, it shall be the duty of the registrant: (1) to follow the instructions of a member or clerk of a local board as to the manner in which he shall be transported to the location where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induction will be accomplished, (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is not accepted by the armed forces, to follow the instructions of the representatives of the armed forces as to the manner in which he will be transported on his return trip to the local board."

To the indictment, defendant pleaded not guilty, was found guilty by a jury on the 10th day of April, 1945,



and within the time allowed by law, perfected his appeal from the judgment of the said District Court rendered on the 27th day of June, 1945, wherein and whereby appellant was sentenced to be imprisoned in the Federal Jail at Anchorage, Alaska, for the term of one year and to pay a fine of \$2,000.00.

This Court has jurisdiction to entertain the appeal by virtue of the provisions of the Act of Congress of May 31, 1935, 49 Statutes-at-Large 313, which is as follows:

“The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions. \* \* \*

Third, In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all civil cases wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds \$1,000; in all criminal cases, and in all habeas corpus proceedings;  
\* \* \*”

---

#### STATEMENT OF THE CASE.

In compliance with the Selective Service Act, the appellant registered with the Local Board No. One of Kelso, Washington, on October 16, 1940. Thereafter on April 16, 1941, he was classified “4-F”.

Thereafter, after sundry reclassifications, on June 29, 1944, the appellant was reclassified to “1-A”, and on July 25, 1944, was transferred to the Anchorage

Local Board No. One at Anchorage, Alaska, for pre-induction physical examination.

On August 11, 1944, appellant was directed by the Anchorage Board to report on August 23, 1944, for preinduction physical examination, and pursuant to such direction, on August 25, 1944, was given his pre-induction physical examination, was found "physically fit, acceptable for general military service." Transcript of Record, Page 88.

On September 26, 1944, an order was mailed to the appellant from the local board of Kelso, Washington, directing him to report for induction at the office of that board on October 12, 1944. Pursuant to instructions contained in said order to report for induction, appellant presented himself at the Local Board of Anchorage, Alaska, and made a written request for transfer for delivery for induction, which was approved. Plaintiff's Exhibit No. 6, T.R. 92.

Thereafter, on October 18, 1944, an order to report for induction was mailed to appellant by the Anchorage Local Board, and received by him on October 19, 1944. Plaintiff's Exhibit No. 7, T.R. 54-55.

By the terms of this last mentioned order, the appellant was directed to report to the said Anchorage Local Board No. One at Room 128, Federal Building, Anchorage, Alaska, at 8:00 A.M. on the 30th day of October, 1944. T.R. 54.

On the said 30th day of October, 1944, the Anchorage Local Board reported to the United States Attorney, Noel K. Wennblom, at Anchorage, Alaska, that

appellant failed to report for induction pursuant to said order to report for induction. Plaintiff's Exhibit No. 8, T.R. 57-58.

This report was signed by one Louise Annabel, a clerk for Local Board No. One, Anchorage, Alaska, and a witness for the government.

The evidence of the government offered and admitted as proof that appellant did fail to report for induction as required by the order of October 18, 1944, was testimony of this witness Louise Annabel, and was as follows:

"The file handed me I have identified as the file of Local Board No. One of Anchorage, Alaska, for registrant John Fannon. The file reflects that in respect to that order to report for induction he failed to report for induction on the 30th day of October, 1944." T.R. 55.

The indictment charges:

"the said John Fannon did then and there wilfully, feloniously, knowingly and unlawfully fail and neglect to report at Fort Richardson, Alaska, for induction, as he was required to do by said order, \* \* \*" T.R. 3.

The said order states:

"You will therefore, report to the local board named above at Room 128 Federal Building, Anchorage, Alaska, at 8:00 A.M. on the 30th day of October, 1944. This local board will furnish transportation to an induction station." T.R. 54.

Sometime previously the appellant had notified the draft board in writing to direct his mail in care of his

attorney, Karl Drager, Box 484, Anchorage, Alaska.  
T.R. 39.

The order to report for induction was mailed to appellant on October 18, 1944, addressed to him in care of Karl Drager, Box 484, Anchorage, Alaska. Plaintiff's Exhibit No. 8, T.R. 57.

In the said last exhibit mentioned is the following recital:

“3. Efforts to locate the delinquent:

The delinquent has been located by Louise Annabel, Anchorage, Alaska, a clerk, Local Board 1, on 30 October, at Palmer, Alaska.”

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### **SPECIFICATIONS OF ERROR.**

The appellant relies upon the following Assignments of Error:

1. Assignment of Error II, T.R. 105-106.
2. Assignment of Error III, T.R. 106-107-108.
3. Assignment of Error IV, T.R. 108-109.
4. Assignment of Error VI, T.R. 110-111.
5. Assignment of Error VIII, T.R. 112.
6. Assignment of Error IX, T.R. 112.

---

### **ARGUMENT.**

#### **ARGUMENT ON ASSIGNMENT OF ERROR III.**

The assignment of error to which this argument is addressed is as follows:

“That the court erred in the admission of certain testimony of the witness Ruth V. Ander-



son, a witness called by the government, as follows:

The Witness. Referring to form D.S.S., dated June 14th, 1943, that is an official form of the department, Selective Service Form 281. This was the form that was mailed to the registrant. (Witness reads paper) as follows: 'June 14, 1943, to John Fannon, Order No. 2253, addressed to Lansing Hotel, Tacoma, Washington. The printed form is as follows: Dear Sir: According to information in possession of this local board, you have failed to perform the duty or duties imposed upon you under the selective service law as specified below'——

Mr. Drager. I object on the ground that it is irrelevant and immaterial. It is too remote.

Mr. Plummer. You have availed yourself of letters dating back to August and September of 1943. I think the relevancy of this form is no more remote than those letters read in the previous examination by Mr. Drager.

Mr. Drager. I would like to know the purpose of it. I have a purpose in referring to the others. I can't see the purpose of this except to prejudice.

Mr. Plummer. May I state the purpose?

The Court. Yes.

Mr. Plummer. My purpose in having that read is that there are several other such forms in the file here, and it is my contention that the present charge is one of a series of events which are a part of a general scheme to evade the selective service law.

The Court. I am not sure of that and the defendant hasn't been indicted for that; however the subject has already been opened up by part of an exhibit that was read at the instance of



counsel for the defendant in which he referred to embarrassment he suffered by reason of failure to receive notice to report for induction and some legal action. This is part of the same subject and the subject is already before the jury. I shall admit it. Objection overruled and exception allowed. You may admit it.

A. Commencing where I left off, the Notice of Delinquency. 'Failure to report for induction. You are therefore directed to report by mail, telegraph, or in person, at your own expense to this local board, on or before 9:00 P.M., on the 19th day of June, 1943. Failure to report on or before the day and hour mentioned is an offense punishable by fine or imprisonment or both.'

Q. Will you turn to D.S.S. Form 281 dated April 10, 1943, and read that to the court and jury, please.

Mr. Drager. Same objection.

The Court. Same ruling. Objection overruled and exception allowed.

A. 'Notice of delinquency. April 10, 1943, to John Fannon, Order No. 2253, Lansing Hotel, Tacoma, Washington. The same form. Dear Sir: According to information in possession of this local board, you have failed to perform the duty or duties, imposed upon you under the selective service law as specified below. Failure to report for physical examination. You are therefore directed to report by mail, telegraph, or in person, at your own expense to this local board, on or before 5:00 P.M. on the 15th day of April, 1943. Failure to report on or before the day and hour specified is an offense punishable by fine or imprisonment, or both. Clerk of Local Board' ". T.R. 106-107-108.

The admission of this evidence was prejudicial error. A well known exception to the rule against the admission of proof of similar offenses is that such evidence is sometimes admissible to show a general scheme to violate the law in the respect charged in the indictment. That was the ground urged in the present instance by the United States Attorney. We again quote his statement as follows:

“My purpose in having that read is that there are several other such forms in the file here, and it is my contention that the present charge is one of a series of events which are a part of a general scheme to evade the selective service law.” T.R. 107.

However, the court did not admit this evidence on that ground or for the purpose indicated, but on the ground that the defendant's attorney had opened up the subject by having a letter written by the defendant read in evidence, which was already part of an exhibit offered and admitted in evidence at the instance of the United States Attorney. The above quoted remarks of the United States Attorney were extremely prejudicial; the defendant was held up to the jury as a consistent and persistent draft evader. The impression necessarily received by the jury must have been highly prejudicial to the defendant.

The fact that subsequently, on recross examination, testimony of Ruth V. Anderson, a witness for the government, revealed that the delinquencies had been cleared up, could not have removed the prejudicial impression thus created. T.R. 50.

The court should not only have sustained the objection to the evidence admitted, but should have emphatically rebuked the United States Attorney and admonished the jury to disregard his remarks, though it is doubtful that even such action could have cured the error and removed the prejudicial impression necessarily received by the jury.

---

#### ARGUMENT ON ASSIGNMENT OF ERROR IV.

The assignment of error to which this argument is addressed is as follows:

“That the court erred in refusing to instruct the jury as requested by the defendant as follows, which was requested by the defendant before the jury was instructed, and to which ruling the defendant excepted and the exception was allowed.

‘A criminal intent, as explained in these instructions is always necessary to constitute a crime, and when such criminal intention does not appear, from all the facts and circumstances proved on the trial, then the act complained of cannot be deemed a crime. Misadventure or accident, when the circumstances rebut the presumption of criminal intention and of criminal negligence, as explained in these instructions, are not deemed, in law, criminal, however injuriously they may affect persons or property. And, in this case, the matter of intent is an essential element of the offense charged, which the government must prove to the satisfaction of the jury beyond a reasonable doubt, and if the evidence fails to establish, beyond a reasonable doubt, that the defendant was able to

report for induction and failed and neglected to do so, with the intent to wilfully evade or avoid induction, it will be the duty of the jury to acquit the defendant.

‘In considering the matter of intent, it is competent for the jury to consider all of the facts in connection therewith, including the physical ability of the defendant to report or not to report, his effort or lack of effort to inform his Draft Board of his whereabouts, and having considered all of these things, to authorize a conviction, the facts and circumstances must not only all be in harmony with the guilt of the accused, but they must be of such character as to be inconsistent with his innocence and consistent with a wilfull intent.’ ” T.R. 108-109.

We strongly urge that under the circumstances of the case, the defendant was clearly entitled to the instruction requested.

---

#### ARGUMENT ON ASSIGNMENT OF ERROR VI.

The assignment of error to which this argument is addressed is as follows:

“That the court erred in giving the jury the following instruction:

‘I instruct you that the essential elements which the government must prove of the charge charged in the indictment are:

First: That the said violation occurred within the jurisdiction of this court;



Second: That said violation occurred on or about the 30th day of October, 1944, or within three years before the finding of the indictment.  
\* \* \*

On the ground that the indictment charged the defendant with having failed to report on October 30th, 1944, not before or after that date, on the ground that time became and was an essential ingredient of the offense, and on the ground that evidence was admitted in the case of other delinquencies of the defendant under the theory that they showed a general scheme of evasion of the law, and that said instruction was misleading to the jury and might have influenced them to convict the defendant for offenses for which he was not on trial.' " T.R. 110-111.

The objectionable part of the above instruction is that contained in Paragraph Second of said instruction, T. R. 111, which is as follows:

"Second. That said violation occurred on or about the 30th day of October, 1944, or within three years before the finding of the indictment.  
\* \* \*,"

It is true that no exception was taken to the instruction complained of, and that therefore, ordinarily no error could be assigned thereon. This consideration will be treated hereinafter in discussing another assignment of error.

It must be conceded that in this case that time was an essential ingredient of the offense. The defendant was ordered to report for induction on a certain date



and was indicted for failure to report on that date. Reporting on some other date than that on which he was required to report, could not have been considered as a compliance with the order, nor could a failure to report on some other date have been considered a violation of the order, nor could a violation of some other order of induction requiring defendant to report on some other date sustain the charge in the indictment.

In this case, evidence was admitted of similar delinquencies of the defendant committed within three years prior to the finding of the indictment. The jury was told by the United States Attorney that the defendant had pursued a general scheme to evade the selective service law and the jury may very well have regarded the instruction complained of as authorizing them to convict the defendant of some other offense than that charged in the indictment.

---

#### ARGUMENT ON ASSIGNMENTS OF ERRORS VIII AND IX.

The assignments of errors to which this argument is addressed, are as follows:

“That the court erred and abused his discretion in overruling defendant’s amended motion for a new trial, filed May 1st, 1945, to which ruling defendant excepted and the exception was allowed.”  
T. R. 112.

“That the court erred and abused his discretion in overruling defendant’s motion for a new trial,

filed June 8th, 1945, to which ruling defendant excepted and which exception was allowed.”  
T. R. 112.

The motions for a new trial based upon the ground of newly discovered evidence are set forth on pages T. R. 75-80.

Although when the government rested its case it was clear from the evidence that the defendant Fannon was lying ill in the hospital at Palmer, Alaska, on October 30, 1944, and that such fact was known to Anchorage Local Draft Board No. One, as appears from their records, admitted in evidence, plaintiff's Exhibit No. 8, T. R. 57, and from the testimony of Louise Annabel with regard thereto, T. R. 57-58-59-60, nevertheless the jury convicted the defendant of intentional and wilful violation of the Selective Service Act of 1940, as amended.

Subsequent to the verdict and within the time allowed by law, the defendant filed his aforesaid motions for new trial based upon the ground of newly discovered evidence. In these motions, particularly in the second motion under date of May 28, 1945, the defendant sets forth by affidavit the circumstances in detail accounting for his being at the hospital in Palmer, Alaska, on the 30th day of October, 1944, the day on which he was under orders to report for induction. In his affidavit in support of said motion, the defendant recites many facts known to him at the time of trial, but also other facts not known to him at the time of trial, which in substance show

that the authorities at Fort Richardson, Alaska, were in communication with the defendant's physician at Palmer, Alaska, on the said 30th day of October, 1944; that the defendant's physician was instructed by an Army Medical Officer at Fort Richardson to continue his treatment of affiant at the Palmer Hospital and not to cause the transfer of affiant to the Fort Richardson military reservation. Also said physician was informed by the said Medical Officer that it was not necessary for the affiant to report for induction on the day set therefor, to-wit, October 30, 1944, nor for ninety days thereafter.

The defendant also states in his affidavit in support of said motion, facts indicating that the Army Medical Officer referred to was one Captain Sidney Leschner, and that the said Captain Leschner was the Induction Officer at Fort Richardson, Alaska at said time.

The defendant did not take the stand, presumably following the advice of his attorney, who died prior to the date of the second motion for a new trial. His attorney evidently was of the opinion that there were sufficient facts in evidence to warrant an acquittal. Be that as it may, the defendant took upon himself the burden of proving his innocence and asked for a new trial in order to have an opportunity so to do. We contend that under the circumstances it was the duty of the Court to have afforded the defendant that opportunity by granting his motion for a new trial and that his failure so to do was an abuse of judicial discretion.

**ARGUMENT ON ASSIGNMENT OF ERROR II.**

The assignment of error to which this argument is addressed is as follows:

“That the court erred in submitting the case to the jury, for the reason that there was not sufficient evidence submitted to the jury to sustain a conviction, and no evidence whatever that the defendant did wilfully fail to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, as charged in the indictment.” (T.R. 105-106.)

It is clearly in evidence as heretofore many times stated, that on the 30th day of October, 1944, the day on which the defendant was under orders to report for induction, the defendant was ill in the hospital at Palmer, Alaska. That fact is shown by the testimony of the government witness, Louise Annabel, a clerk of the Anchorage Local Draft Board No. One. (Tr. 58, 59-60.) She testified as follows:

“That is all that is filled in by this office. It is signed by me. As a matter of fact, this is a copy. My signature is on there, but it is a copy. The original went to the District Attorney's office. It is addressed to Mr. Wennblom, United States Attorney, and this is a copy we hold in our files. It states, referring to the section numbered '3' at the bottom of the first page, that the delinquent has been located at Palmer, Alaska. The paragraph I read on the reverse side states that the following persons may know the whereabouts of the delinquent. Listed under that paragraph is Oscar Olson, United States Deputy Marshal. The date on which he was to have reported was on



the 30th day of October at 8:00 o'clock A.M. The date of this (plaintiff's Exhibit No. 8) is October 30, 1944. I remember having a phone call from you (Mr. Drager) in reference to Mr. Fannon's failure to report. I remember that at the time you called and reported to me that he was in the hospital at Palmer, that I replied to you that we already knew that. I made a report of this delinquent to the Kelso board. The regulations provide that we Local Board No. 1 of Anchorage make the report of delinquency to the district attorney. This DSS Form 550 I have just read is the report we made. My understanding is that immediately this report goes to the district attorney, we then lose jurisdiction of the registrant, that the matter is in the hands of the district attorney, and is out of our hands. There is no recommendation as to procedure from our office, as to what should be done, to the district attorney's office. We knew that Mr. Fannon was in the hospital at Palmer from communicating with the hospital at Palmer and they verified it. *The doctor said he was ill, that there was something the matter with him, but as yet he hadn't determined what the trouble was.* He hadn't operated at that time on the defendant here. I talked to the doctor personally. I did not have any communication with a colonel of the Medical Corps at the Fort in connection with Mr. Fannon about that time in connection with his illness or his failure to report. I talked to I believe it was a Captain Leshner. He is a medical officer. There was a conversation on the subject of his (Fannon's) being ill and in the hospital. The information came from me. I do not know if he made any investigation at all."



And on redirect examination, the witness further testified:

“By Mr. Plummer:

(File handed to the witness.)

Witness continuing: I have before me what purports to be a memorandum of a telephone conversation which I had with doctor—Captain Leshner on October 30, 1944. Captain Leshner told me that inasmuch as the registrant John Fannon was an inductee, he could be removed or rather he would be accepted at Fort Richardson and held there under observation for the determining of his condition.”

And on recross examination:

“By Mr. Badger (Drager): I did not communicate that information to Mr. Fannon or to any of his representatives.” (T.R. 58-59-60.)

In this connection, Ruth V. Anderson, a witness for the government and an assistant clerk of the Draft Board No. One of Kelso, Washington, testified as follows:

“Generally a man is reported to the district attorney immediately when he fails to report for induction. The regulations say promptly. The regulations use the word promptly. That is under section 642.21. The board has discretion in the matter within a reasonable extent. However regulations state he should be reported promptly on failure to report. He is considered delinquent when he fails to report immediately. But it is

still in the board's hands until it is reported to the district attorney." (T.R. 42. )

In alluding to Section 642.21, the witness evidently referred to Section 642.41 of the Selective Service Regulations, which is as follows:

"642.41. REPORT OF DELINQUENT TO THE UNITED STATES ATTORNEY. (a) Every registrant who has heretofore or who hereafter fails to comply with an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50) shall be reported promptly to the United States Attorney on Delinquent Registrant Report (Form 550); provided that if the local board believes that by reasonable effort it may be able to locate the registrant and secure his compliance, it may delay the mailing of such Delinquent Registrant Report (Form 550) for a period not in excess of 30 days. A copy of such Delinquent Registrant Report (Form 550) shall be placed in the delinquent's Cover Sheet (Form 53).

(b) In endeavoring to locate and to secure the compliance of a delinquent prior to reporting him to the United States Attorney, the local board should contact the delinquent and the 'employer' or 'person who will always know' the delinquent's address, as shown on the Registration Card (Form 1), or any other person likely to know his whereabouts. The local board may enlist the aid of local and State police officials or any other public or private agencies it deems advisable. In no event, however, will the local board order or participate in a delinquent's arrest. \* \* \*"

There is no question but what the Anchorage Local Board reported the delinquency "promptly". The delinquency was reported on October 30, 1944, the same day on which defendant failed to report. No time was lost; no effort was made to locate the registrant. He was already located; he was at Palmer, Alaska, a few miles from Anchorage, Alaska. It is so stated in the Report of Delinquency. He was known to be ill in the hospital.

There was no testimony offered or introduced tending to show that the defendant was purposely in the hospital or was purposely pretending to be sick in order to evade the draft. No such inference could be legitimately drawn from the evidence. The fact that the date on which the defendant was ill and in the hospital coincided with the date he was due to report for induction could not afford such an inference. It was a coincidence which could not overcome the presumption of innocence. On the evidence before the jury the defendant was unable to report. The prosecution had abundant opportunity to investigate the matter and ascertain all facts which might indicate that the defendant was a malingerer.

On November 1, 1944, Mr. Karl Drager, the defendant's attorney, in whose care the draft board was instructed to send his mail, wrote a letter to Local Board No. One, Kelso, Washington, as follows:

"Gentlemen:

On behalf of John Fannon who was ordered to report to the Local Board, Anchorage, October 30, for induction, you are informed that Mr. Fan-

non has been under the doctor's care and on or about October 28, 1944 was hospitalized at the Palmer Hospital at Palmer, Alaska for a major operation. At the present time he is in the hospital convalescing from the operation. This information was given to the Local Board, Anchorage, but at the request of Mr. Fannon, I am forwarding it to you also. This communication is not for the purpose of change of address as no change of address is necessary. Palmer, Alaska, is adjacent to Anchorage, Alaska, and proper provisions have been made for forwarding and contacting.

Very truly yours,  
John Fannon,  
By Karl A. Drager, Attorney."

(T.R. 37-38.)

There is another and more cogent reason to support our contention that there was insufficient evidence to warrant a conviction, and that the Court should have directed a verdict of not guilty.

The charging part of the indictment states as follows:

"Said John Fannon \* \* \* did wilfully, knowingly, feloniously and unlawfully fail and neglect to perform a duty required of him under and in the execution of said Act and the rules and regulations made pursuant thereto, in that, \* \* \* and having been theretofore duly ordered and notified by said Local Board Number One, at said Anchorage, to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, pursuant to the powers conferred upon such



Board by the 'Selective Training and Service Act of 1940, as amended' and the rules and regulations duly made pursuant thereto, the said John Fannon did then and there wilfully, feloniously, knowingly and unlawfully fail and neglect to report at Fort Richardson, Alaska, for induction, as he was required to do by said order, \* \* \* " (T.R. 2-3).

It will be noted that the indictment recites that the defendant was ordered and notified to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, and that he failed and neglected to report for induction at Fort Richardson, Alaska, as required to do by said order.

The defendant was not by any order in writing, or otherwise, ever ordered to report for induction at Fort Richardson. By the order referred to in the indictment, under date of October 18, 1944, the defendant was directed and ordered as follows:

"You will therefore report to the Local Board named above at Room 128 Federal Building, Anchorage, Alaska, at 8:00 o'clock A.M. on the 30th day of October, 1944." (T.R. 54.)

The defendant was further informed that the Local Board would furnish transportation to an induction station. He was further informed as follows:

"If you are so far removed from your own local board that reporting in compliance with this order will be a serious hardship and you desire to report to a local board in the area of which you are now located, go immediately to that local board and make written request for



transfer of your delivery for induction, taking this order with you." (T.R. 55.)

Fort Richardson, Alaska is not mentioned in the Order to Report for Induction referred to in the indictment. A reporting at Fort Richardson by the defendant would not have been a compliance with the Order of Induction. The defendant has been tried and convicted of failing to perform a duty, the performance of which would not devolve upon him until ordered to perform it. The duty which he was ordered to perform as defined in section 633.21 of the Selective Service Regulations is as follows:

"DUTY OF REGISTRANT TO REPORT FOR AND SUBMIT TO INDUCTION. (a) When the local board mails to a registrant an Order to Report for Induction (Form 150), it shall be the duty of the registrant to report for induction at the time and place fixed in said order. \* \* \*

(b) Upon reporting for induction, it shall be the duty of the registrant: (1) to follow the instructions of a member or clerk of a local board as to the manner in which he shall be transported to the location where the induction will be accomplished. \* \* \* "

There is not a scintilla of evidence that the defendant was ever ordered or notified by Anchorage Local Board No. One to report for induction at Fort Richardson, Alaska, on the 30th day of October 1944, or on any other day.

It is true that at the close of the government's case no motion was made by the defendant or his attorney

that the Court direct the jury to return a verdict of not guilty on the ground of insufficiency of the evidence to support a verdict of guilty. Nor was such a motion made when both sides had rested. Likewise, in regard to another Specification of Error heretofore argued, no objection, no exception was taken by the defendant or his attorney, and we concede that ordinarily this Court would not take cognizance of assigned errors not predicated upon proper objections and exceptions. We cannot, of course, account for the failure of defendant's counsel to protect the record, but we can only ask the Court to follow the rule laid down in *Van Gorder v. United States*, 21 Fed. (2d) page 942, paragraph 6:

“Counsel for the United States object to the consideration or action of this Court in this case under this writ of error, because, while in the course of the trial the defendant's counsel recorded many objections to rulings of the Court, he recorded no exceptions and made no motion or request that the Court direct the jury to return a verdict in the defendants' favor. But, since the decision of the Supreme Court in *Wiborg v. U.S.*, 163 U.S. 632, 659, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, there has been and still exists an alleviation in the interests of justice of the strict rule and practice that no relief whatever may be granted by the federal appellate Courts, except on recorded objections or exceptions to rulings in the trial Courts, to the effect that in criminal cases involving the life or liberty of the accused the appellate Courts of the United States may notice and correct, in the interest of

a just and fair enforcement of the law, serious errors in the trial of the accused fatal to the defendant's rights, although those errors were not challenged or reserved by objections, motions, exceptions, or assignments of error. *Crawford v. U.S.*, 212 U.S. 183, 194, 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; *Weems v. U.S.*, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705; *August v. U.S.* (CCA.) 257 F. 388, 392; *McNutt v. U.S.* (C.C.A.) 267 F. 670, 672; *Lamento v. U.S.* (CCA.) 4 F. (2d) 901, 904, and cases cited. This is a criminal case, the liberty of the defendant below for five years of his life, less good time he might earn, is at stake; if he is innocent of the crime charged against him, an irreparable injury will be inflicted upon him by the affirmance of the judgment before us. After a careful scrutiny of all the evidence and the proceedings in the trial of this case, we cannot divest our minds of the conclusion that there was not sufficient evidence of the guilt of the accused at his trial to sustain the verdict of his conviction under the established rules of law to which reference has been made.

The judgment is accordingly reversed, and the case remanded to the court below for further proceedings."

The same reasons which impelled the Court to depart from the strict rules of practice in the case in which the opinion above quoted was rendered, apply with equal or perhaps more force in the instant case.

In the *Van Gorder* case the offense was larceny. The defendant was convicted of larceny and con-

fronted with a five year sentence. In the instant case the defendant was convicted of what is unpopularly known as draft dodging. He was tried in a war zone, in war time, in a territory that had been invaded, at a place adjacent to Fort Richardson populated with thousands of soldiers, at a place where the people were necessarily war conscious.

Under these circumstances it was the duty of the trial Court to exercise the utmost care to at all times protect the defendant from any appeal to the passion and prejudice of the jury; to guard against a verdict "on general principles"; against the admission of prejudicial testimony, such as evidence of other delinquencies and the remarks of the district attorney in support of its admission.

It was moreover the duty of the Court in its instructions to carefully restrict the jury to consideration of the crime charged in the indictment and no other, that is, a failure to report for induction on October 30, 1944 pursuant to an order to report on that day, instead of which the jury was told that the government must prove "that said violation occurred on or about the 30th day of October, 1944, *or within three years before the finding of the indictment,*" thus almost inviting the jury to consider delinquencies of the defendant occurring long prior to the date of the offense charged, notwithstanding such delinquencies had been "cleared up." (T.R. 50.)

Sec. 633.21 of the Selective Service Regulations provides as follows:



“Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuous duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.”

The witness Louise Annabel, called by the government, on direct examination testified as follows:

“Q. Will you refer to the file of Selective Service Board No. 1. Local Board No. 1 of Anchorage, Alaska, and by referring to your file are you able to state whether or not the defendant, Mr. Fannon, ever made application or request for postponement of induction in connection with this Order to Report for Induction on the 30th day of October, 1944? A. No, sir.

Witness continuing: Referring to our files of Local Draft Board No. 1 of Anchorage, Alaska, no one else ever made application or request for postponement of Mr. Fannon's induction, a request in his behalf in regard to the Order to Report for Induction on October 30, 1944. Again referring to the file, I can state that the induction of John Fannon was never postponed by Local Draft Board No. 1 of Anchorage, Alaska. Mr. Fannon has not, to my knowledge, contacted Local Draft Board No. 1 at Anchorage, Alaska, at any time since October 30, 1944.” (T.R. 56.)

The purpose of this testimony is evidently to prove delinquencies subsequent to the 30th of October, 1944. What other purpose could there be?



The indictment was found March 23, 1945. So evidence is offered to prove continual delinquency of the defendant from October 30, 1944, to March 23, 1945, notwithstanding that the witness further testified that after the delinquency is reported to the district attorney the board loses jurisdiction of the registrant. (T.R. 59.) And the government witness, Ruth V. Anderson also testified:

“It is out of the hands of the local board after the form is mailed to the district attorney.”  
(T.R. 56-59.)

As to the testimony of Louise Annabel (T.R. 56) to the effect that that defendant had never made application for postponement of induction in connection with the Order to Report for Induction on the 30th day of October, 1944, we refer to the letter of the Cowlitz County Local Board under date of August 1, 1944:

“1 August, 1944

John Fannon  
c/o Karl Drager  
Anchorage, Alaska  
re: Order No. 2253

Dear Sir:

We have your letter of 25 July, 1944 requesting postponement of induction and we wish to advise that following your preinduction physical examination and before you are ordered to report for active duty, local board will give considera-

tion to your request and will advise you at that time.

Yours truly,  
Cowlitz County Local Board,  
Walter J. Vitous,  
Chairman

AB:ra

By \_\_\_\_\_  
Clerk''

The foregoing was in response to a letter written by the defendant under date of July 25, 1944 (T.R. 49) as follows:

“July 25, 1944

Dear Sirs: I have just received a card from you putting me in 1-A. I would like to know if I can have enough time before induction to harvest our potato crop and cultivate. We have in 9 acres of potatoes, my partner is an old man and not capable of doing this and help is nearly impossible to obtain. It would work quite a hardship on my wife and child if the crop was a loss as she isn't hardly able to work and take care of a small child. Thanking you I remain, John Fannon, care of Karl Drager.” (T. R. 49.)

The witness Ruth V. Anderson testified that the foregoing letter was not considered a deferment request. (T. R. 49.) Yet the Board did so consider it and assured the defendant that it would be considered and he would be advised *in time*. Yet the Anchorage Local Board did not so advise him. They knew his whereabouts, that he was ill in the hospital in Palmer; they made no effort to contact him as required by law

to do, but with all possible expedition reported him delinquent to the district attorney's office.

The conduct of the prosecution from start to finish indicates hostility and unfairness toward the defendant.

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### CONCLUSION.

The judgment rendered in this case should be set aside because of:

First. The admission of proof of similar offenses, before and after the date charged, and remarks of the district attorney in connection therewith prejudicial to the defendant.

Second. Instruction of the Court that the crime charged could have been committed within three years prior to the finding of the indictment.

Third. Refusal of the Court to instruct the jury as requested by the defendant on the subject of criminal intent.

Fourth. Abuse of discretion in overruling defendant's motion for a new trial based upon newly discovered evidence.

Fifth. Insufficiency of the evidence to justify the verdict, in that:

a. The evidence clearly showed that the defendant was ill in the hospital at Palmer, Alaska, on the date of the alleged offense and could not possibly have complied with the Order of Induction.

b. And finally and principally because,

The indictment charges the defendant with failure to perform a duty required by the Selective Service Act of 1940, as amended, and rules and regulations duly made pursuant thereto, in that having been ordered and notified by Anchorage Local Board No. One to report for induction at Fort Richardson, Alaska, on the 30th day of October, 1944, he wilfully, feloniously, knowingly and unlawfully failed and neglected to report at Fort Richardson, Alaska, for induction.

Whereas the evidence of the government showed that the defendant had never been ordered to report at Fort Richardson, Alaska for induction, inferentially or otherwise.

Dated, Anchorage, Alaska,

February 18, 1946.

Respectfully submitted,

GEORGE B. GRIGSBY,

*Attorney for Appellant.*

E. COKE HILL,

*Of Counsel.*





No. 11107

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**JOHN FANNON, APPELLANT**

*v.*

**UNITED STATES OF AMERICA, APPELLEE**

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**BRIEF FOR THE APPELLEE**

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**THERON LAMAR CAUDLE,**  
*Assistant Attorney General.*

**FRANK J. HENNESSY,**  
*United States Attorney.*

**NOEL K. WENNBLOM,**  
*United States Attorney.*

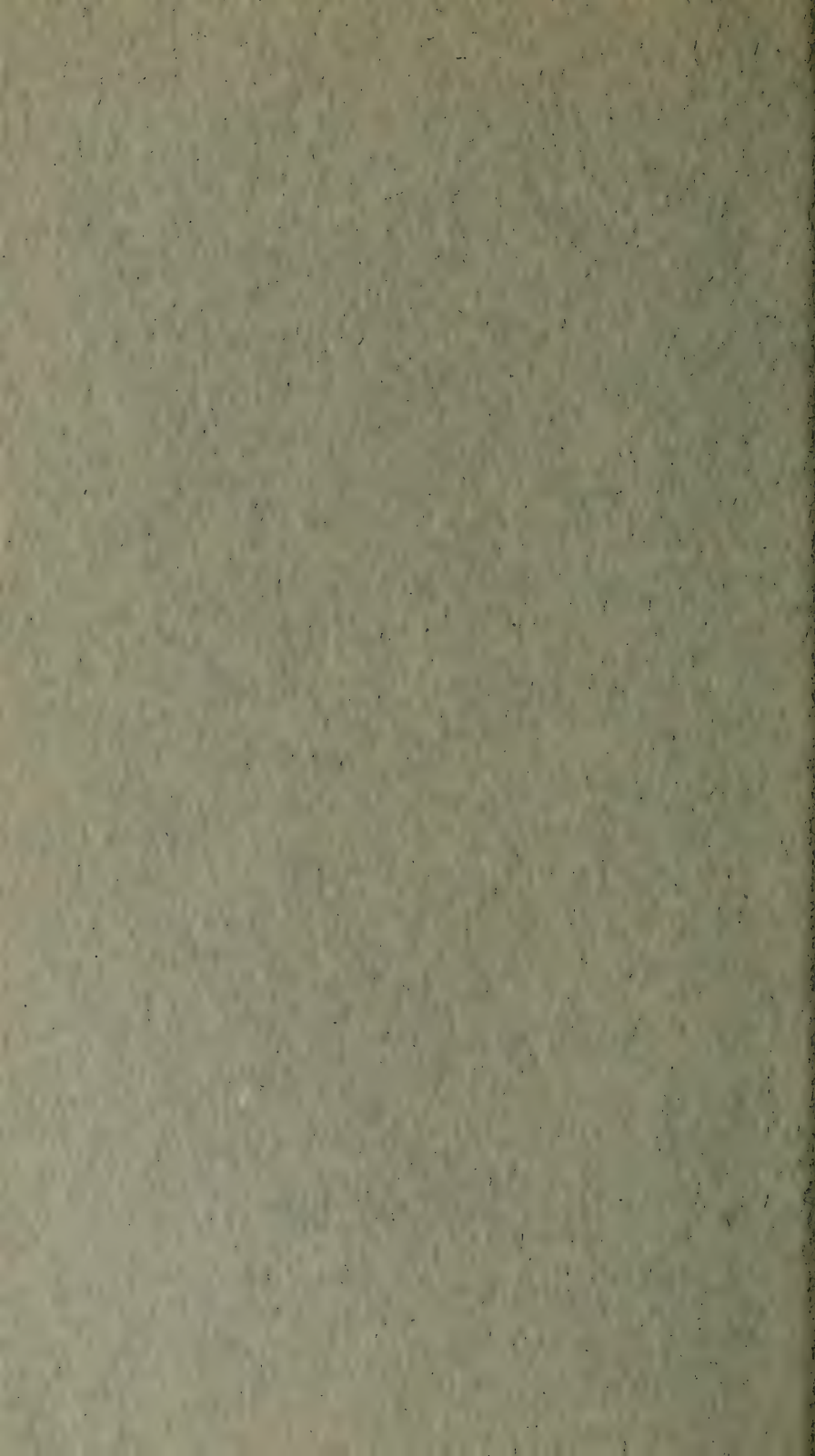
**GEORGE R. GALLAGHER,**  
*Attorney, Department of Justice.*

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**FILED**

**APR 23 1946**

**PAUL P. O'BRIEN,**  
**CLERK**



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# **In the United States Circuit Court of Appeals for the Ninth Circuit**

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No. 11107

JOHN FANNON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

BRIEF FOR THE APPELLEE

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STATEMENT OF THE CASE

Appellant was indicted in the District Court for the Territory of Alaska, Third Division, for knowingly failing and neglecting to perform a duty required of him under the provisions of the Selective Training and Service Act of 1940, as amended, and the rules and regulations made and directions given thereunder (R. 2). The indictment contained one count and charged that on or about October 30, 1944, appellant, being a registrant under the Selective Training and Service Act of 1940, as amended, with the Local Selective Service Board, Number One, at Kelso, Washington, and a transfer registrant with Local Selective Service Board, Number One, at Anchorage, Alaska, did wilfully, knowingly, feloniously and unlawfully fail and neglect to perform a duty required of him under and in the execution of said Act and the rules and regulations thereunder in that, having



been classified by his local board located at Kelso, Washington, in Class 1-A and having been duly and regularly transferred to the Local Board Number One at Anchorage, Alaska, for induction, and having been theretofore duly ordered and notified by said Board to report for induction at Ft. Richardson, Alaska, on October 30, 1944, pursuant to the powers conferred upon such Board by the aforesaid Act and the regulations thereunder, appellant did wilfully, feloniously, knowingly and unlawfully fail and neglect to report at Ft. Richardson, Alaska, for induction, as he was required to do by said order (R. 2-3). This indictment was returned on March 24, 1945 (R. 4).

Thereafter appellant was tried by a jury and found guilty (R. 28). His two motions for a new trial were denied (R. 76, 80), and he was sentenced to imprisonment for a term of one year and to pay a fine of \$2,000 (R. 80).

#### STATEMENT OF FACTS

Appellant registered with Local Board Number One, Kelso, Washington, on October 16, 1940, pursuant to the Selective Training and Service Act. On April 16, 1941, he was classified 4-F. He received various classifications thereafter (R. 32-33). Subsequently that local board wrote three warning letters to appellant concerning three separate and distinct delinquencies, not including the offense for which he was tried; these letters were dated June 6, 1942, April 10, 1943, and June 14, 1943. The first of these involved failing to submit a change of address; the second was for failure to report for physical examina-

tion; the last was for failure to report for induction (R. 44-47). At some point after registering for selective service, appellant had moved to Alaska where he became employed (R. 40, 98).

After passing a preinduction physical examination, appellant was ordered to report to Room 128, Federal Building, Anchorage, Alaska, for induction on October 30, 1944 (R. 54). Appellant received this notification on October 19, 1944 (R. 55). He entered a private hospital on October 29, 1944 (R. 78) and failed to report for induction on the date specified (R. 48, 55). On November 1, 1944, appellant's attorney notified the local board at Anchorage, Alaska, that appellant was in the hospital at nearby Palmer, Alaska (R. 37-38, 59).

The United States Attorney was notified by the local board that appellant had not reported for induction (R. 57) and, upon learning of his hospitalized status, it was decided that no steps would be taken pending his release from the hospital (R. 62). At some later date appellant was released from the hospital and went to Fairbanks, Alaska, where he was arrested on January 10, 1945 (R. 13). At no time subsequent to the notification of his hospitalized status and prior to his arrest did he contact or report to the draft board nor the prescribed army authorities (R. 56).

#### QUESTIONS PRESENTED

1. Whether the evidence was sufficient to justify submission of the case to the jury.

2. Whether the court erred in admitting testimony to the effect that appellant had committed prior de-

linquencies in connection with the Selective Training and Service Act.

3. Whether error resulted in refusing appellant's requested instruction to the jury pertaining to the element of criminal intent.

4. Whether the court's charge might have misled the jury into convicting appellant for offenses for which he was not indicted.

5. Whether the trial court abused its discretion in overruling appellant's two motions for a new trial.

#### ARGUMENT

#### I

**The Court was justified in submitting the case to the jury**

Appellant has merged several unrelated arguments under his second Assignment of Error but it appears that the principal contentions are as follows: (1) Appellant was in the hospital on October 30, 1944, and was physically unable to report on that date, and (2) the indictment charges that he failed to report at Ft. Richardson, Alaska, as ordered, whereas the order to report for induction directed him to appear at the Federal Building, Anchorage, Alaska. There is no disputing that both of these allegations are factually correct. We submit, however, that neither contention has any merit.

(A) The crux of the crime committed by appellant is not that he failed to report for induction on October 30, 1944, but that he failed to report at any time prior to his arrest at Fairbanks, Alaska, on January 10,

1945. The duty to report is a continuing obligation and obviously does not cease when a selectee fails to report on the specified date.<sup>1</sup> The indictment charges that “\* \* \* on or about the 30th day of October 1944 [defendant] did wilfully \* \* \* neglect to perform a duty \* \* \* to report for induction at Fort Richardson, Alaska, on the 30th day of October 1944 \* \* \*.” It states that the offense took place “on or about the 30th day of October.” It was necessary to allege it in that way because the duty to report began on October 30, 1944, and continued on thereafter. The offense began at such time as the failure to report became wilful and deliberate.

It can be seen therefore that appellant was not indicted for failure to report at a time when he was hospitalized. It was his failure to report when he became able to do so that formed the offense. In fact the Assistant United States Attorney testified that the United States Attorney had decided that no action would be taken until it was determined that appellant had not reported upon his release from the hospital (R. 62). The date of appellant's release from hospi-

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<sup>1</sup> Section 642.15 of the Selective Service Manual, which became effective on November 1, 1943, provides as follows:

*“Continuous duty of certain registrants to report for induction. Regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction (Form 150) or to report for work of national importance pursuant to an Order to Report for Work of National Importance (Form 50), it shall thereafter be his continuous duty from day to day to report for induction or for work of national importance, as the case may be, to his own local board and to each local board whose area he enters or in whose area he remains.”*



talization does not appear in the record. But it does reveal that on January 10, 1945, the date of his arrest, he was found in Fairbanks, Alaska (R. 13), which is a considerable distance from Palmer, Alaska, where he was hospitalized. Appellant failed to report to or contact any selective service authority upon his release from the hospital (R. 56). Nowhere did appellant allege that he attempted to contact any authority upon his release from the hospital and prior to his arrest, nor does it appear that he did.

(B) Appellant further contends that, since the indictment alleges a failure to report to Ft. Richardson, Alaska, whereas he was actually directed by the local board to report to the Federal Building in Anchorage, Alaska, this is fatal error. Apparently the contention is that appellant was thus charged with a failure to perform a duty which had not in fact existed.

Perhaps the indictment was inartificially drawn. But it hardly requires argument to prove that this is a formal defect and has therefore been cured by verdict. The error does not go to the gist of the offense, i. e., failure to report for induction; and the fact that an erroneous address was given as the proper place to have reported cannot by any stretch of the imagination render the indictment fatally defective. No attack was made upon the indictment at the proper time and appellant is therefore estopped from an objection to errors of form at this time. *Holmgren v. United States*, 217 U. S. 509, 523; *Moore v. United States*, 56 F. 2d 794, 795 (C. C. A. 10).



It is submitted that the evidence was sufficient for submission to the jury. A failure to report for induction during the period from October 30, 1944, to January 10, 1945, was shown. The allegation that appellant could not have knowingly and wilfully failed to report because he was hospitalized was entirely disposed of by showing that he failed to perform the continuing duty upon his release from the hospital. As a matter of fact he had left the vicinity and had gone to Fairbanks, Alaska, where he was located and arrested.

## II

### **Appellant was not substantially prejudiced by admission of evidence of prior delinquencies**

Appellant contends that reversible error resulted from the admission of evidence disclosing that he committed prior delinquencies. Further, he asserts, the prosecutor's statement in explaining the purpose for which he was introducing such testimony, i. e., that it was intended to show they were a part of a scheme to evade the selective service law (R. 45), was prejudicial to appellant.

It can hardly be said that appellant was substantially prejudiced by this statement. It is well established that evidence of previous similar acts is admissible for the purpose of showing criminal intent. *Weiss v. United States*, 122 F. 2d 675, certiorari denied, 314 U. S. 687, rehearing denied, 314 U. S. 716; *King v. United States*, 144 F. 2d 729 (C. C. A. 8). Since testimony of this sort is admissible for that purpose, it is plain that the prosecutor's explanatory

remark is immaterial. It is not the remark of the district attorney, but rather the law of evidence, which determines the admissibility of testimony. In addition to this, the court pointed out at that time that appellant had not been indicted for a scheme to evade the law (R. 45). Also, the defense brought out on cross-examination of government witness Ruth Anderson that the previous delinquencies had been cleared up subsequently by appellant (R. 50). Certainly these statements would have eliminated any possibility of prejudice.

The admissibility of the testimony of witness Anderson concerning prior delinquencies should not be construed as prejudicial even though the court did not limit it to the element of criminal intent. Appellant had previously opened this field on cross-examination of the witness by causing her to read a letter in his file in which appellant stated that he was embarrassed and put to expense as a result of being arrested for an earlier delinquency (R. 39-40). The prosecutor obviously felt it incumbent upon him to counteract this attitude of self-righteousness by showing the other delinquencies. It is submitted that appellant cannot later complain of such testimony since the field was opened by him.

### III

**There was no error in refusing appellant's instruction to the jury on criminal intent**

Little need be said of this contention. Appellant states that the trial court erred in not accepting his

requested instruction on criminal intent (R. 72). He does not contend that the court did not instruct the jury adequately on this point. Actually the court's instruction (R. 63-73) gave the established law very clearly and simply. No rule is better settled than that the court is not required to give a charge in the exact language of defendant's request when the court's own language adequately covers the subject. *Winter v. United States*, 13 F. 2d 53 (C. C. A. 8); *McAdams v. United States*, 74 F. 2d 37 (C. C. A. 8).

Since no harm is alleged and none appears, this assignment of error appears frivolous.

#### IV

**The trial court did not err in its instruction to the jury regarding the time element of the offense charged**

Appellant argues that the trial court was in error in instructing the jury that the government must prove, among other things, that “\* \* \* said violation occurred on or about the 30th day of October 1944, or within three years before the finding of the indictment herein” (R. 65). It is said that this instruction may well have caused the jury to believe it was authorized to convict appellant of some offense other than that charged in the indictment, i. e., the prior delinquencies to which Miss Anderson testified.

The law as stated by the court is elementary. In *Gerson v. United States*, 25 F. 2d 49, 56 (C. C. A. 8), it was said “If it is shown that the offense was prior

to the indictment and within the statute of limitations it is sufficient. *Bold v. United States*, (C. C. A.) 265 Fed. 581; *Goldberg v. United States* (C. C. A.) 295 Fed. 447." Nothing in this case would take it out of the general rule; nor does appellant reveal any sound reason for considering it an exception to the general rule.

## V

### The trial court did not abuse its discretion in overruling appellant's motions for a new trial

Appellant made two separate motions for a new trial (R. 75-80). The first rested on three grounds: (1) Insufficiency of the evidence, (2) error in law occurring during the trial, and (3) newly discovered evidence. This motion was supported by an affidavit made by the attorney who represented appellant at the trial and pertained solely to alleged newly discovered evidence. The second motion was based solely on the grounds of newly discovered evidence and was supported by a more detailed affidavit made by appellant himself. In his brief, appellant addresses his argument on this assignment of error solely to the question of newly discovered evidence. The government will therefore confine itself to this ground.

Appellant states that he learned after his trial that the army medical authorities had been in contact with his private physician on October 30, 1944, and had instructed the physician to continue his treatment of appellant and not to cause his transfer to them, the



army authorities, at Ft. Richardson, Alaska; further, that the army medical officers said it would not be necessary for appellant to report for induction on the day specified, nor for ninety days thereafter.

Apparently the inference sought to be drawn from the above allegations is that they vitiate the wilfulness of appellant's failure to report for induction and thereby negative the necessary criminal intent. But appellant's argument answers itself. If he had no knowledge of the above allegations until after his trial, they could not possibly have had any effect on his failure to report. It therefore does not meet the requirement that such evidence would reasonably and probably change the verdict in this case. *Irvin v. Buick Motor Co.*, 88 F. 2d 947 (C. C. A. 8); *Boardman v. McKinnon*, 169 Fed. 496 (C. C. A., S. D., N. Y.); see also *Williams v. United States*, 137 U. S. 113, 137.

Even if he were not precluded by his own statement, appellant makes no showing that there was the essential abuse of discretion by the trial court in overruling his motions for a new trial.

#### CONCLUSION

Appellant had a fair and impartial trial and there was sufficient evidence to support the verdict. No reason exists for upsetting the verdict of the jury which heard the evidence presented by the prosecution and the defense and found appellant guilty after having been fully and fairly advised by the trial judge



of the law applicable to the case. We respectfully submit that the judgment of conviction should be affirmed.

THERON L. CAUDLE,  
*Assistant Attorney General.*

FRANK J. HENNESSY,  
*United States Attorney,*

NOEL K. WENNBLOM,  
*United States Attorney,*

GEORGE R. GALLAGHER,  
*Attorney, Department of Justice.*

APRIL 1946.

No. 11113

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

JACK EUGENE THOMSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

FILED

JAN 3 1946

PAUL A. O'BRIEN,  
CLERK



No. 11113

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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JACK EUGENE THOMSON,

Appellant,

vs.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

A. L. WIRIN,

J. B. TIETZ,

257 S. Spring St.,

Los Angeles 12, Calif.

For Appellee:

CHARLES H. CARR,

United States Attorney,

JAMES M. CARTER,

Assistant U. S. Attorney,

WM. P. HAUGHTON,

Assistant U. S. Attorney,

JAMES C. R. McCALL,

Assistant U. S. Attorney,

600 U. S. Post Office and Court House

Bldg., Los Angeles 12, Calif. [1\*]



In the District Court of the United States in and  
for the Southern District of California, Central Division

February, 1945, Term

No. 17796

Viol.: United States Code, Title 50, Appendix,  
Section 311, Selective Training and Service  
Act of 1940.

## INDICTMENT

In the Name and by the Authority of the United States of America, the Grand Jury for the Southern District of California, at Los Angeles, presents on oath in open court:

That Jack Eugene Thomson, hereinafter called the defendant, is a male person within the class made subject to selection service under the Selective Training and Service Act of 1940, as amended; that defendant registered as required by said Act and the rules and regulations promulgated thereunder and became a registrant of Local Board No. 176, said board being then and there duly created and acting, under the Selective Service System established by said Act, in the County of Los Angeles, State of California, in the division and district aforesaid; that pursuant to the terms and provisions of said Act and the rules and regulations promulgated thereunder, said defendant was classified in Class 1-A and was subsequently notified of said classification by said board, and a notice and order by said board was thereafter duly given to

said defendant to report for induction into the armed forces of the United States of America on May 24, 1945, at Reseda, Los Angeles County, California, within the division and district aforesaid; that said defendant did at said time and place knowingly and unlawfully fail and neglect to perform a duty required of him under said Act and the rules and regulations promulgated thereunder, that is to say, the defendant did then and there knowingly and unlawfully fail and neglect to report for induction into the armed forces of the United States, as so notified and ordered to do;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CHARLES H. CARR,

United States Attorney [2]

A true bill,

J. BOWLES, JR.,

Foreman.

[Endorsed]: Filed June 20, 1945. [3]

At a stated term, to-wit: The February Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 2nd day of July, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Peirson M. Hall,  
District Judge

No. 17,796—Crim.

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

JACK EUGENE THOMSON,  
Defendant.

This cause coming on for arraignment and plea of defendant, Jack Eugene Thomson; Wm. H. Haughton, Assistant U. S. Attorney, appearing as counsel for the Government; J. B. Tietz, Esq., appearing as counsel for the said defendant, who is present on bond:

The defendant states his true name is as set forth in the Indictment, and being informed that he is entitled to a jury trial waives reading of the Indictment and pleads not guilty.

It is ordered that the cause be, and it hereby is, set for trial on July 12, 1945, at 10 a.m.

At a stated term, to-wit: The February Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday, the 13th day of July, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Pierson M. Hall,  
District Judge.

[Title of Cause.]

This cause coming on for further trial of the defendant Jack Eugene Thomson; James McCall, Esq., Asst. U. S. Attorney, appearing for the Government; A. L. Wirin, Esq., appearing for the defendant; the defendant being present on bond; it is ordered that trial proceed.

Attorney Wirin makes opening statement to the Court for the defendant.

Jack Eugene Thomson, the defendant, (7914 $\frac{1}{2}$  W. Norton Ave., Hollywood) is called, sworn, and testifies in his own behalf.

At 12:02 p.m. Court recesses to 2 p.m. Court reconvenes at 2:10 p.m.; all present as before.

Jack Eugene Thomson, the defendant, resumes the stand and testifies further. Defendant's Exhibit D, article dated May 26, 1928, entitled "Peace on Earth, Good Will Towards Men", is admitted into evidence. The defendant rests at 2:42 p.m. The Government waives opening argument. Attorney

Wirin argues to the Court for the defendant. Attorney McCall makes a statement. The Court makes a statement. Attorney Wirin argues further to the Court. The Court finds the defendant guilty as charged and orders this cause referred to the Probation Officer of investigation and report and continued to Monday, July 30, 1945, at 2 p.m., for hearing on said report and sentence. The defendant is permitted to remain at liberty on present bond. [5]

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At a stated term, to-wit: The February Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 30th day of July, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Peirson M. Hall,  
District Judge.

[Title of Cause.]

This cause coming on for hearing on report of the Probation Officer and for sentence of defendant Jack Eugene Thomson; Wm. P. Haughton, Assistant U. S. Attorney, appearing as counsel for the Government; A. L. Wirin, Esq., appearing as counsel for the said defendant, who is present on bond:

Attorney Wirin makes a statement in mitigation.



The Court pronounces sentence upon the defendant as follows:

District Court of the United, Southern District of  
California

No. 17796—Criminal Indictment in one count for  
violation of U.S.C., Title 50, Sec. 311 App.—  
S. T. & S. A.

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

JACK EUGENE THOMSON,  
Defendant.

### JUDGMENT AND COMMITMENT

On this 30th day of July, 1945, came the United States Attorney, and the defendant Jack Eugene Thomson, appearing in proper person, and by counsel, A. L. Wirin, Esq., and,

The defendant having been convicted on a verdict of guilty of the offense charge in the Indictment in the above-entitled cause, to-wit: failure to report for induction into the armed forces of the United States, as so notified and ordered to do, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, hav-

ing been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one (1) year in a Federal Penitentiary to be designated by the Attorney General and in addition thereto pay a fine unto the United States of America in the sum of \$1000.00, and stand committed until paid.

It is Further Ordered that the clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed)            PEIRSON M. HALL,  
United States District Judge.

Filed this 30th day of July, 1945.

(Signed)            EDMUND L. SMITH,  
Clerk.

By J. M. HORN,  
Deputy Clerk.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Name and address of Appellant: Jack Eugene Thomson, 7914½ West Norton Avenue, Hollywood, California.

Name and address of Appellants' attorneys: A.

L. Wirin and J. B. Tietz, 257 South Spring Street,  
Los Angeles 12, California.

Offense: Violation of Selective Training and  
Service Act of 1940.

Date of Judgment: July 30, 1945.

Brief description of judgment or sentence: Im-  
prisonment, date and place to be designated by  
the Attorney General.

Name of prison where now confined: L. A.  
County Jail.

I, the above-named Appellant, hereby appeal to  
the United States Circuit Court of Appeals for the  
Ninth Circuit from the judgment above mentioned  
on the grounds set forth below.

Dated: July 30, 1945.

(Signed) JACK THOMSON,

Defendant and Appellant [8]

## GROUND OF APPEAL

### I.

The judgment of conviction is unsupported by  
the evidence.

### II.

The Court erred in ruling that there was no mis-  
apprehension of the law in the action of the Selec-  
tive Service Agencies in refusing the defendant a  
classification as a conscientious objector.

## III.

The Court erred in holding that the defendant could not present, as a defense, evidence that the defendant was a conscientious objector although the defendant had submitted to and completed all of the administrative formalities leading to induction short of actually taking the oath of induction.

## IV.

The judgment of conviction violates the rights of defendant to freedom of religion.

Dated this 30th day of July, 1945.

A. L. WIRIN and J. B. TIETZ  
By A. L. WIRIN,  
Attorneys for Defendant and  
Appellant. [9]

Received copy of the within Notice of Appeal  
this 31st day of July, 1945.

CHARLES H. CARR RM  
U. S. Attorney,  
Attorney for U. S.

[Endorsed]: Filed July 31, 1945. [10]

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[Title of District Court and Cause.]

## APPLICATION FOR BAIL ON APPEAL

Jack Thomson defendant, having been found guilty; and having filed his Notice of Appeal, hereby applies for bail on appeal.

There is a substantial question on appeal unde-

terminated by the Supreme Court of the United States or by the Ninth Circuit Court of Appeals. That question is whether or not a registrant charged with a violation of a Local Draft Board order has sufficiently exhausted his administrative remedies and steps within the Selective Service System so as to challenge the validity of the Local Draft Board order as a defense to a criminal prosecution.

A. L. WIRIN and J. B. TIETZ  
By A. L. WIRIN  
Attorneys for Defendant and  
Appellant

[Endorsed]: Filed July 31, 1945. [11]

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[Title of District Court and Cause.]

ORDER RELEASING DEFENDANT ON  
BAIL ON APPEAL

Upon application of the defendant for release on bail on appeal, the defendant having filed his Notice of Appeal,

Good cause appearing therefor

It is ordered that the defendant be released on bail, on appeal to the Ninth Circuit Court of Appeals in the sum of \$2,500.

Dated this 31st day of July.

PEIRSON M. HALL,  
Judge.

[Endorsed]: Filed July 31, 1945. [12]



## BOND ON APPEAL

United States of America,

Southern District of California—ss.

Be It Remembered, that on this 31st day of July in the year of our Lord one thousand nine hundred and forty-five, before me, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, in the Ninth Circuit, personally came Jack Thomson, principal, and Charles Mackintosh, surety, and severally acknowledged themselves to owe to the United States of America, the sum of Twenty Five Hundred (\$2,500.00) Dollars, depositing herewith with the Clerk Twenty Five Hundred Dollars in United States currency, said sum being the property of Charles Mackintosh, surety, if default shall be made in the conditions following, to-wit:

Whereas, lately on the 30th day of July, 1945, in the District Court of the United States for the Southern District of California, in a cause pending in said District Court between the United States of America and Jack Thomson, defendant, a judgment and sentence was rendered against the said Jack Thomson and the said Jack Thomson filed an appeal in the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence imposed against him, and

Whereas, bail was fixed in the sum of Twenty Five Hundred Dollars pending the disposition of said appeal.

Now, the conditions of this recognizance are such, that if the said Jack Thomson shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument or when required by law or rule of said United States Circuit Court of Appeals and from day to day thereafter in said United States Circuit Court of Appeals until said cause is finally disposed of, and shall abide by and obey all [13] orders made in said cause and shall surrender himself in execution of the judgment and sentence appealed from upon such day as the District Court of the United States for the Southern District of California may direct, if the judgment and sentence appealed from shall be affirmed, and shall appear before the District Court of the United States for the Southern District of California on such day or days as shall be set for a retrial of said case, provided the judgment of the District Court of the United States for the Southern District of California is reversed by the said United States Circuit Court of Appeals; and shall not depart the jurisdiction of the District Court of the United States for the Southern District of California without leave, then this recognizance to be void, otherwise to remain in full force, virtue and effect.

And we, the undersigned Principal and Surety, do hereby Stipulate, Agree, and Consent, that in case the aforesaid recognizance shall be forfeited judgment may be entered for the sum set forth in

said recognizance, and that execution issue thereon according to law.

JACK THOMSON,  
Principal

CHARLES MACKINTOSH,  
Surety.

EDMUND L. SMITH,  
Clerk, U. S. District Court, Southern District of  
California

By J. M. HORN,  
Deputy Clerk, U. S. District Court, Southern Dis-  
trict of California. [14]

Examined and recommended for approval as pro-  
vided in Rule 8.

J. B. TIETZ,  
Attorney for Petitioner.

This recognizance shall be deemed and construed to contain the "consent and agreement" for summary, judgment and execution therein mentioned in Rule 8 of the District Court.

The within bond is approved and ordered filed this 31st day of July, 1945.

PEIRSON M. HALL,  
Judge.

[Endorsed]: Filed July 31, 1945. [15]

[Title of District Court and Cause.]

APPLICATION FOR EXTENSION OF TIME  
FOR SETTLING BILL OF EXCEPTIONS;  
AND AFFIDAVIT

State of California,  
County of Los Angeles—ss.

A. L. Wirin, being first duly sworn, deposes and says: that he is an attorney for the defendant herein; that he has been unable to prepare a proposed Bill of Exceptions for the reason that the court reporter has been crowded with many tasks, and has been unable, up to the present time, to prepare a Transcript of the proceedings of the trial of the case.

Wherefore, an extension of thirty days is prayed for, within which a Bill of Exceptions may be settled and filed.

A. L. WIRIN.

Subscribed and sworn to before me this 17th day of August, 1945.

(Seal) J. B. TIETZ,  
Notary Public

ORDER

Good cause appearing therefor, it is hereby ordered that the time for the preparation, settling and filing of a Bill of Exceptions herein be extended to September 30, 1945.

PEIRSON M. HALL,  
United States District Judge.

[Endorsed]: Filed Aug. 20, 1945. [16]

[Title of District Court and Cause.]

PRAECIPE—INSTRUCTION TO CLERK RE  
PREPARATION OF RECORD

To the Clerk of the above-entitled Court:

You will please prepare a transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the following pleadings, proceedings, orders and documents, to-wit:

1. The Indictment.
2. Minute Order of July 2, 1945, arraignment and plea.
3. Minute Order of July 13, 1945, finding of guilt.
4. Minute Order of July 30, 1945, Judgment, sentence and Commitment.
5. Minute Order of July 31, 1945, fixing amount of bail bond on appeal.
6. Bail bond on appeal.
7. Notice of Appeal and Grounds of Appeal.
8. Stipulation and order extending time for Bill of Exceptions, August 20, 1945. [17]
9. Assignment of Errors.
10. Order extending time for Bill of Exceptions, October 3, 1945.



11. Bill of Exceptions and attached exhibits.

12. This Praecipe.

Dated this 14th day of November, 1945.

A. L. WIRIN and J. B. TIETZ

By J. B. TIETZ,

Attorneys for Defendant [18]

## AFFIDAVIT OF SERVICE BY MAIL

(C.C.P. 1013a)

State of California,

County of Los Angeles—ss.

Miriam Lischner, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above-entitled cause; that affiant's address is 257 So. Spring St., Los Angeles 12, Calif. That on the 14th day of November, 1945, affiant served the within Praecipe Instruction to Clerk Re Preparation of Record on the Attorney for Plaintiff in said action by placing a true copy thereof in an envelope addressed to the attorney of record for said Plaintiff, at the address of said attorney as follows: Chas. H. Carr, Esq., U. S. Att'y, Sixth Floor, Post Office and Court House Bldg., Los Angeles 12, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Postoffice at Los Angeles, California, where is located the office of the

attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

MIRIAM LISCHNER

Subscribed and Sworn to before me this 14th day of November, 1945.

(Seal) J. B. TIETZ,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 15, 1945. [19]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 19 inclusive contain full, true and correct copies of Indictment; Minute Orders entered July 2, 1945, July 13, 1945, and July 30, 1945; Judgment and Commitment; Notice of Appeal; Application for Bail on Appeal; Order Releasing Defendant on Bail on Appeal; Bond on Appeal; Application and Order Extending Time for Settling Bill of Exceptions and Praecept, which together with Original Bill of Exceptions and Orig-

inal Assignment of Errors, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$6.25, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 21st day of November, 1945.

(Seal)                      EDMUND L. SMITH,  
Clerk

By THEODORE HOCKE,  
Chief Deputy Clerk.

---

[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

Defendant in the above-entitled action assigns as errors the following:

#### I.

The action of the Court in ruling that there was no misapprehension of the law in the action of the Selective Service Agencies in refusing the defendant a classification as a conscientious objector.

#### II.

The holding of the court that the defendant could not present, as a defense, evidence that the defendant was a conscientious objector although the de-

fendant had submitted to and completed all of the administrative formalities leading to induction short of actually taking the oath of induction.

### III.

The judgment of conviction violates the rights of defendant to freedom of religion.

Dated this 21st day of September, 1945.

A. L. WIRIN and J. B. TIETZ

By J. B. TIETZ,

Attorneys for Defendant and  
Appellant

Received copy of the within this 22nd day of  
September, 1945.

CHARLES H. CARR,

U. S. Attorney

[Endorsed]: Filed Sept. 24, 1945.

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At a Stated Term, to wit: The October Term 1945, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the first day of October, in the year of our Lord one thousand nine hundred and forty-five.

Present: Honorable Clifton Mathews, Circuit Judge, Presiding; Honorable William Healy, Cir-

cuit Judge; Honorable Homer T. Bone, Circuit Judge.

No. 11113

JACK EUGENE THOMSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER EXTENDING TIME TO PROPOSE  
AMENDMENTS TO LODGE BILL OF EX-  
CEPTIONS, AND TO HAVE THE BILL  
OF EXCEPTIONS SETTLED AND FILED

Upon consideration of the application of Mr. James C. R. McCall, Jr., Assistant United States Attorney, counsel for appellee, for an extension of time within which the appellee may propose amendments to the bill of exceptions heretofore prepared and lodged by appellant, and appellee through his counsel, Messrs. A. L. Wirin and J. B. Tietz, consenting thereto, and by direction of the Court.

It Is Ordered that the time within which appellee may propose its amendments to the lodged bill of exceptions herein, and within which appellant may procure to be settled and filed the bill of exceptions herein be, and hereby is extended to and including October 30, 1945.

I hereby certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.



Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 2nd day of October, 1945.

(Seal)                      PAUL P. O'BRIEN,  
Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Oct. 3, 1945.

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[Title of District Court and Cause.]

### BILL OF EXCEPTIONS

Be It Remembered that the above entitled case came on for trial on July 12 and 13, 1945, before the Honorable Peirson M. Hall, United States District Judge, in the District Court of the United States for the Southern District of California, Central Division, at Los Angeles, California.

The United States of America, plaintiff, appeared by Charles H. Carr, United States Attorney, and James C. R. McCall, Jr., Assistant United States Attorney, and the defendant Jack Eugene Thomson appeared in person and with counsel, A. L. Wirin.

Plaintiff and defendant signed and filed a waiver of trial by jury, approved by the Court, and the trial was heard by District Judge Hall, without a jury.

The following proceedings were thereupon had, and the following evidence, both oral and documentary, including the stipulations herein contained, was received, in the presence of the defendant, to-wit:

HUGO A. CARLSON

Called as a witness on behalf of the Government, and having been duly sworn, testified as follows:

That he is chairman of Local Board No. 176 of the Selective Service System, at Reseda, California; defendant is a registrant attached to the territorial jurisdiction of this local board, and first registered with such board on April 21, 1943, giving his address as 18000 Ventura Boulevard. Defendant was last classified 1-A by the local board on November 20, 1944; and upon appeal by the defendant, he was classified 1-A by the Appeal Board on April 11, 1945; defendant was notified of this action; and was ordered to report for induction into the armed forces on May 24, 1945, at Reseda, in Los Angeles County, California; and failed to appear at the time and place designated in such order.

Mr. Carlson identified, and there were admitted in evidence as Government's Exhibits Nos. 1, 2, 3, 4, and 5, the following papers and documents contained in the defendant's Selective Service file kept by the local board, the pertinent or material provisions of such exhibits being as follows, to-wit:

## GOVERNMENT'S EXHIBIT No. 1

Defendant's Registration Card (DSS Form 1, Rev. 11-16-42), stating, over the defendant's signature, the following information about himself, under oath; Serial No. W-79; Name, Jack Eugene Thomson; Order No. 11845; Place of Residence, 18000 Ventura Blvd., Tarzana, Los Angeles County, California; Mailing Address, Employer's Name and Address and Place of Employment, all given as—Adohr Milk Farms, 18000 Ventura Blvd., Tarzana, Calif.; Age in Years, 18; Place and Date of Birth, April 21, 1925, Los Angeles, California. Date of Registration, April 21, 1943.

## GOVERNMENT'S EXHIBIT No. 2

Defendant's Selective Service Questionnaire (DSS Form 40, Rev. May 26, 1941) signed and sworn to by defendant May 10, 1943, stating the following, to-wit:

"To the best of my knowledge, I have no physical or mental defects or diseases." . . . "I have completed 8 years of elementary school and 4 years of high school." "I have had the following schooling other than elementary and high school: Name of University, University of California in Los Angeles; Court of Study, Pre-Mechanical Engineering, Major; Length of Time Attended, 2½ Semesters." "The job I am now working at is—Machine Milker. I do the following kind of work in my present job: I wash and milk 52-60 cows twice a day." "I have had ½ years experience in this kind

of work. My average monthly earnings in my present job are \$175.00." Questions in Series VII for "Minister, or Student Preparing for the Ministry," checked in ink by defendant without answers.

The following statements were checked affirmatively by defendant in Series X:

"1. By reason of religious training and belief, I am conscientiously opposed to war in any form and therefore claim exemption from combat training and service.

"2. I am also, by reason of religious training and belief, conscientiously opposed to participation in noncombatant military service and request, in the event I am found to be conscientiously opposed thereto, that, in lieu of my induction into the land or naval forces of the United States, I be assigned to work of national importance under civilian direction; and I agree to perform such work and conform to all rules and directions made and given with reference thereto by the President of the United States or by such person as he may designate or appoint for such purpose pursuant to such rules and regulations as he may prescribe."

Instructions printed over these statements were:

"Only registrants who are conscientiously opposed to combatant or non-combatant military service by reason of religious training and belief shall fill in this series, and shall obtain from the Local Board a special form (Form 47) on which to give substantial evidence of conscientious objection. The

Local Board, after considering all other classes of deferment, will determine whether the registrant shall be classified as a conscientious objector on the basis of the claim made and the information contained in the special form."

Under Series V—Agricultural Occupations, the defendant said he was working as a "wage hand (hired man)," "I have been engaged in farm work for 1/2 years . . . I do live on the farm with which I am connected . . . I am not actually responsible for the operation of the farm on which I live." . . . The principal crops and livestock of the farm—Approximately 2,000 cows. "The number of people who work on this farm is approximately 50 of whom all (50) are hired hands."

Under Registrant's Statement Regarding Classification, defendant wrote: "2-C is the usual classification of milkers on this dairy and I think that I should be given this classification before my Class IV Classification is considered."

On the back of the Questionnaire appear the following entries:

#### Minutes of Action by Local Board

"The Local Board classifies the registrant Class II. Subdivision C by the following vote: Yes 3, No —. 5/10/43. (Signed) W. Frank Brown, Member."

#### Appeal to Board of Appeal

"I hereby appeal to the Board of Appeal from



the determination of the Local Board. Date 4/22/44.  
(Signed) Louis S. Frye, Appeal Agent."

Minutes of Other Actions

Dates

- 4-17-44—Form 57 to Registrant, Form 44 to Appeal Agent, Form 59 to Employer.
- 4-18-44—Re-Classified 2-C, 3 Yes L.C.H.
- 4-18-44—DSS Form 57 to registrant, 59 to U.S. D.A., 110 to appeal agent.
- 5- 8-44—File returned from State Hdq. after appeal.
- 5- 8-44—Reclassified 1-A-O DSS Form 57 to registrant, 59 to employer, and U.S.D.A.
- 5-15-44—Appeared before board requesting 4-E classification.
- 5-16-44—File sent to Captain Raider, Coordinator.
- 6- 1-44—Registrant classified in 4-E by Board of Appeal, vote of 4 to 0 (File not returned to Local Board on this classification.
- 7-11-44—File returned after reconsideration by Board of Appeal. Classification changed to 2-C by Board of Appeal, vote of 4 to 0.
- 7-11-44—Form 57 to registrant. Form 59 to employer, U.S.D.A. War Board, Appeal agent.
- 9- 6-44—Reclassified in 1-A. Deferment not recommended by U.S.D.A. War Board. Not sufficient evidence in file to justify 4-E classification. 2 votes. L.P.F. H.A.C.
- 9- 7-44—Form 57 to registrant. Form 59 to employer and U.S.D.A. War Board.

## Dates

11-20-44—Registrant appeared before the Board. H.A.C. No new evidence submitted—Continued in 1-A. 3 Yes. L.C.H.

4-20-45—File returned after appeal. Department of Justice did not uphold claim of reg as conscientious objector. Appeal board classified registrant in 1-A by vote of 3 to 0.

4-20-45—Form 59 mailed to registrant and to employer.

## GOVERNMENT'S EXHIBIT No. 3

Order to Report for Induction (DSS Form 150, Rev. 1-15-43): "Date of Mailing, 5-4-45."

"The President of the United States,

"To Jack Eugene Thomson, Order No. 11845.

## Greetings:

"Having submitted yourself to a local board composed of your neighbors for the purpose of determining your availability for training and service in the land or naval forces of the United States, you are hereby notified that you have been selected for training and service therein.

"You will therefore report to the local board named above (Local Board No. 176) at 18451 Sherman Way, Reseda, Calif., at 6:30 a.m. on the 24th day of May, 1945. (Signed) Hugo A. Carlson, Member or clerk of the local board."

GOVERNMENT'S EXHIBIT No. 4

Five Letters From the Defendant, as follows:

The first, dated May 23, 1945, addressed to and received by Local Board No. 176 on May 24, 1945, and reading as follows:

"Gentlemen: This is to advise you that I will not appear for induction May 24, 1945. I have no desire to disobey the law, but as my conscience will not permit me to kill, I cannot accept military service. Enclosed is a copy of a letter which I am sending to the United States Attorney, the United States Marshal, the Federal Bureau of Investigation and the Federal Commissioner advising them of my delinquency and telling them where I can be conveniently located. Respectfully, Jack Thomson."

The other four letters, dated May 24, 1945, and addressed respectively to the four federal officers and agency mentioned above, at the proper street addresses in Los Angeles, Calif., each read as follows:

"Dear Sir: This is to advise you that I have not appeared for induction into the armed forces as directed by my draft board. My scheduled induction date is May 24, 1945. My name is Jack Eugene Thomson, I can be found at 7914½ W. Norton Ave., Hollywood 46. The telephone number here is HE 5748. When you wish to arrest me, if you will call me or send me a letter, I will be happy to report at any place you designate. Respectfully yours, Jack Thomson."

## GOVERNMENT'S EXHIBIT No. 5

Report of the Hearing Officer of the Department of Justice, Pursuant to Section 5(g) of the Selective Training and Service Act of 1940; and Letter Containing the Ruling of the Department of Justice Based Thereon, dated March 29, 1945, both as follows:

“Department of Justice

Office of the Assistant to the Attorney General  
Washington 25

March 29, 1945

“Chairman, Appeal Board No. 12, Group 14  
Selective Service System  
Room 210, 333 West 2nd Street  
Los Angeles 12, California

Dear Sir:

Re: Jack Eugene Thomson, Order No.  
11845, Local Board No. 176, Reseda,  
California.

“After examination and review of the entire file and record, the Department of Justice finds, as a matter of fact, that the conscientious objections of the above-named registrant are not sustained on the ground that he has failed to prove that such alleged objections are based upon religious training and belief.

“As required by Section 5(g) of the Selective Training and Service Act of 1940, an inquiry has been made in this case and an opportunity to be

heard on his claim for exemption was accorded to the registrant by Honorable E. S. Williams, Hearing Officer for the Southern District of California. The report made by the Hearing Officer to the Department is enclosed, together with the Selective Service Cover Sheet, for the information of your Board.

“Accordingly, the Department of Justice recommends to your Board that the registrant be not classified as a conscientious objector.

“The original of this letter containing the recommendation of this Department and the report of the Hearing Officer should be placed in the registrant’s Cover Sheet in accordance with Section 627.25(c) of the Selective Service Regulations.

“It will be appreciated if you will advise this office of the classification accorded this registrant by your Board after consideration of the foregoing recommendation.

Very sincerely,

JAMES P. McGRANERY

The Assistant to the Attorney  
General.”



“Report of Hearing Conducted by the Department of Justice Pursuant to Section 5(g) of the Selective Training and Service Act of 1940

Re: Jack E. Thomson, Conscientious Objector

Local Board No. 176, Reseda, Los Angeles County,  
Appeal Board No. 12, Group 14, Los Angeles, California.

File No. 45-0197—Docket No. 820  
United States Attorney 820  
Hearing Officer 820”

“Preliminary Statement

Name and Address of Registrant: Jack E. Thomson, 7914½ W. Norton Avenue, Hollywood, California.

Questionnaire Filed: D.S.S. Form 40, May 10, 1943. D.S.S. Form 47, May 10, 1943.

Nature of Claim for Exemption: From both combatant and non-combatant military service.

Action by Local Board: Classified II-C, May 10, 1943. Reclassified II-C, April 17, 1944. Reclassified IA-O, May 8, 1944. Reclassified II-C by Board of Appeal July 11, 1944, and Form 57 sent to Registrant on same day. Reclassified I-A, September 6, 1944. Classification I-A continued November 20, 1944.

Date of Appeal: November 28, 1944.

Action by Appeal Board: The Board of Appeal

reviewed the file and decided that the registrant should not be classified in any of the classes set forth in Section 623.21 of the Regulations and ordered the entire file to be transmitted to the Department of Justice for the purpose of securing an advisory recommendation—January 3, 1945.

Date File Received by the Department of Justice: January 18, 1945.

Date File, Including Investigative Report of Federal Bureau of Investigation, Received by Hearing Officer: March 6, 1945.

Notice of Hearing: March 6, 1945.

Hearing Held Pursuant to Notice: At room 600, Federal Building, Los Angeles, 12, California, on March 20, 1945. Registrant personally appeared at the hearing in response to notice mailed to him."

### **"STATEMENT OF FACTS**

"1. Registrant was born April 21, 1925, being now twenty years of age. His education consisted of eight years elementary school, four years high school and two and one-half semesters at the University of California in Los Angeles taking a preparatory course for Engineering. Registrant is employed at the present time as a machine milker for Adohr Milk Farms.

"2. Registrant stated that he had never been a member of any church or religious organization and that his parents had not been members of any church or religious organizations. He stated that

he knew very little about the bible, having seldom read the bible and that he did not know any of the books of the bible, not knowing what were the first four books of the New Testament. Registrant stated that he had not been interested in or active in any Social Welfare work or organization. He stated that when he was in high school and general collections were made among the students for the benefit of the Red Cross, he had contributed along with the others and he said that likewise he had made contributions to the Community War Chest at times when campaigns for funds were being held. He stated that he had never made any contribution to the Red Cross Blood Bank, because working in the dairy as he was, he needed all of his strength. Registrant stated that his mother and father were glad to contribute to the relief of personal friends who might be in financial distress but that they had never connected themselves with any work for public aid and relief, as for example, the Red Cross. While registrant was at the University of California in Los Angeles, he did not participate in the activities of the religious or welfare center conducted in that college community. Registrant entered the University when he was 17, this was in the early part of 1942 and registrant continued at the University pursuing his pre-Engineering course until the latter part of that year. Registrant stated that at this time he saw an advertisement of the Adohr Milk Farms calling for milkers and stating that good wages were paid, and that the work entitled the employee to occupational deferment. Registrant

stated that upon reading this advertisement, he concluded that he would apply for employment, that he did so and was accepted, and has worked for the Adohr Milk Farms since. He stated that the principal inducement to him to apply for this employment was the chance of obtaining occupational deferment with respect to Selective Service. He said that also the wages paid were regarded by him as very good. Registrant stated that he came to this conclusion himself and that he did not take this employment at the suggestion of his parents. Registrant stated that while he was in high school he engaged in some forms of sport, such as wrestling and touch ball, his preference being for volley ball. He never played the American game of football and he never went hunting and fishing. He stated that he had always been taught by his parents to be kind and gentle toward animals and toward people and that he never should engage in any fights or physical conflicts. Registrant stated he was interested in music and paintings and Architecture, and that his inclination was toward the quiet life and not mixing with other people in general. He stated that his parents had considered having a farm in Canada or in the Argentine and that his father would have liked this kind of a life. Registrant stated that he could not take the life of an animal and that particularly he could not take the life of a human being. Registrant stated that he could not take the life of a criminal or of a desperado, even to save the life of one near and dear to him. He would do all he could to protect such a person, and would forfeit



his own life in attempting to give that protection, but if that effort would not avail, he nevertheless would not take the aggressor's life. Registrant stated that this attitude had been taught him at home and he associated it in his mind with the teachings of Jesus. Scenes of violence and carnage were repellant to registrant, as he stated, although he said further that aversion to such scenes was not the cause of his refusal to take another's life. While at the University of California in Los Angeles, registrant took R.O.T.C., and became a Corporal for excellence in drill—he at no time made any protest against taking this military training..

“3. Dr. E. P. Ryland appeared with registrant as a witness in registrant's behalf. Dr. Ryland stated he had known registrant about two years and that he had had numerous talks with registrant and had attempted to get to the foundation of registrant's ideas. Dr. Ryland stated that while registrant was not a religious conscientious objector in the ordinary sense, he felt that registrant was sincere in his attitude.

“4. No exhibits were offered or introduced.

“5. A summarization of the investigative report of the Federal Bureau of Investigation in this case is as follows:

“It was ascertained at the high school attended by registrant that he graduated in 1942 with high scholastic honors. A teacher stated that registrant was a very hard worker, but that he was not par-



ticularly altruistic, explaining that registrant was not enthusiastic about contributing to the various charities. Another teacher stated that registrant was not very altruistic, explaining that registrant had not contributed to such charities as the Red Cross, informant not knowing whether this was due to personal penuriousness or whether registrant did not approve of such charities, this informant saying, however, that he would recommend registrant for his personal qualities. It was ascertained at the University of California in Los Angeles that registrant entered on January 30, 1942, and withdrew on November 24, 1942, registrant's major being Physics; that registrant gave as his reason for withdrawing, that he had over strained his eyes and that he felt if he quit, his eyes would come back to normal.

"A reference stated that registrant was a very self-contained boy and did not express his thought much to others; that registrant did not belong to any church and had never gone to Sunday school; that registrant's father was well able to put registrant through school and that informant did not know why registrant had left school; that registrant had been brought up in a gentle way and taught that fighting and killing were wrong and that informant believed therefore, that registrant was sincere in his present attitude: that registrant's father, while not belonging to the Socialists was a student of Socialism and that a brother of registrant's father had belonged to the Socialist party in Kansas City.

"Another reference stated that registrant was a

studious, fine boy and not one to discuss his innermost feelings, informant saying that informant had heard registrant make only one statement concerning registrant's pacifism, namely that he was against killing, as there were other ways to settle things than through wars; that registrant had been brought up under Pacifist conditions since a child and was different from other boys his age, in that he was satisfied to stay home and study or read and did not always want to be "on the go," registrant liking, however, paintings and music and taking an interest in Architecture; that informant believed that registrant's conscientious objection was derived through his own reasoning and was not due to registrant's parents, although informant believed that registrant would not take a major step without discussing it with his parents; that informant believed that registrant was sincere and honest in his present attitude and was not attempting to evade military service by claiming to be a conscientious objector.

"Another reference stated that informant, since knowing registrant in 1938, had known him to be against killing and war and that such attitude was registrant's own idea and not that of his parents; that, however, registrant had been brought up that way and was a very gentle sort of boy and had never played football because he was opposed to conflict; that informant had never heard registrant discuss religion and did not know whether or not registrant believed in God, informant saying, however, that informant believed that registrant was a sincere

Pacifist; informant stated that registrant had read literature issued by the Fellowship of Reconciliation; that registrant had an inquisitive mind and was much inclined after artistic things, such as music and painting; that informant believed that registrant was sincere.

“A party who had known registrant about seven years stated that he was from a fine family, that he was gentle, studious, kind and courteous; that registrant’s father was a Pacifist and that informant believed registrant had been brought up by his father as a conscientious objector; informant saying that informant believed that the objection of registrant’s father was political rather than moral, informant saying, however, that informant believed registrant was sincere and was not trying to evade military service.

“An employer stated that registrant was a good worker and got along well with other employees and that informant was aware that registrant was a conscientious objector.

“A fellow employee stated that registrant was a quiet, unassuming boy and a good worker, that there had been some comment about registrant for his failing to contribute to the Red Cross or Community Chest.

“A foreman stated that registrant was quiet, industrious and a good worker, dependable and trustworthy; that informant knew that registrant was a conscientious objector, but that registrant never said anything about it.

"Another informant at the same place of employment stated that registrant was studious and inquisitive; that registrant was self-centered and put his own interests before those of others; that on one occasion registrant had gone into the cook house and had taken all the bananas and eaten them himself, bananas being a scarce item of diet for the men on the farm, and that on this occasion registrant's demeanor was "The hell with anyone else" (when called to his attention registrant denied the foregoing incident, stating that on one occasion when he went into the cook house, as he was permitted to do to get oranges or such, he found a large quantity of bananas and had taken two for himself—H.O.); that registrant never contributed to any public charities, such as the Red Cross or Community Chest when the employing Company sought contributions from all employees, and that registrant had ridiculed the idea of giving blood for the wounded soldiers and had ridiculed the idea of buying war bonds (registrant denied these last two statements—H.O.); that registrant had bragged that he was an Agnostic and that he was only working at the dairy to secure deferment as an essential agricultural worker, and that registrant never has mentioned that his opposition to war is based on the taking of human life, but has always argued to the effect that the United States was wrong to be in the war and had no business to be in it in the first place (registrant stated that the foregoing did not correctly represent his position, that he never undertook to say whether or not the Government was



right or wrong, but took the position simply that as for himself, he would not engage in the war—H.O.).

“A neighbor said that when informant had expressed wonder why registrant was not in the army, his father had said that registrant was in an essential industry; that registrant was a retiring sort of boy.

“Other neighbors stated that registrant was an only child and informants believed registrant’s conscientious objections resulted from pressure from his parents, that, however, registrant had a mind of his own and was very practical, materialistic and highly intelligent.

“A former class mate of registrant at high school stated that registrant was recognized as a most intelligent student, but that registrant was a self-centered and conceited boy, who was friendly but not particularly popular; that informant never had heard registrant mention the war or any objections to it and that informant was not aware that registrant was a conscientious objector.

“A party who had been intimate with registrant as well as a neighbor, stated that informant had not heard registrant state his views with regard to military service, although informant had assumed more or less that registrant was opposed to military service, this assumption based on informant’s observation of registrant and his family, informant saying that he knew that registrant’s parents were opposed to military service, although informant recalled no definite statements by them; that informant knew



no reason why registrant would be working in a dairy if it were not to gain the advantage of deferment, as registrant had made good grades in the University and his father was financially able to pay registrant's expenses there; that informant never had quite known whether registrant was actually opposed to military service or whether his parents had talked him into it; that when registrant went up for re-classification, he had resigned himself to accept the decision of the Board, informant recalling that registrant's parents had been very strict with him and for a long time had refused to allow registrant to own a bicycle because of fear that registrant might injure himself while riding it; that informant had not talked recently with registrant concerning religious beliefs but that previously registrant had professed to be an Atheist, and that neither he nor his parents belonged to any church, and that registrant in discussion of the international situation had expressed himself as being anti-British (registrant denied that he was anti-British, although opposing as he said some of the things which the English had done, referring particularly to India—H.O.); that registrant's habits were good, registrant not smoking nor drinking; that registrant's opposition to military service was not due to lack of courage, as registrant could not be classed as yellow, and that informant believed that registrant was sincere.

“Another party stated that registrant was very radical in his philosophy and one night at dinner had stated that he was an Atheist; that informant

had not heard registrant express his views as to conscientious objection but that informant was not surprised that registrant did object.

“A former intimate friend of registrant stated that registrant first commenced discussing the draft about three years ago, at which time registrant was interested in Engineering and Architecture and was going to the University of California in Los Angeles; that when registrant was threatened by the draft his parents withdrew him from school and registrant took employment as a milker in order that he might obtain deferred classification; that at some time in the summer of 1943 registrant had told informant that registrant was willing to go into the armed services, but that his parents strongly opposed his doing so; that registrant has told informant that registrant's father, as a young man, was interested in Communism and that registrant himself was known to informant to have read some of the writings of Karl Marx, having discussed such with informant from time to time; that some time in the summer of 1943 registrant told informant that registrant did not believe in the principles of this war and that he did not want to be a tool and he did not like the political set-up and that registrant at this time was very bitter in his denunciation of the war from a political standpoint; that registrant is a thoroughly honest and sincere individual of good character and habits and that informant believed that registrant was not an Atheist and had some belief in a supreme being and immortality; that while informant believes that regis-

trant is honest and sincere in his position at this time, informant is convinced that registrant is merely reflecting the thoughts and beliefs of his parents.

### “CONCLUSIONS

“The Hearing Officer does not believe that registrant has any definite religious interest or any broad interest in social or political welfare. Apparently registrant and his parents have lived a very quiet life within their own family circle and have not been interested in public life or affairs; that registrant has an earnest desire to avoid going into the army with all the change in manner of living which army life entails, is quite apparent. The Hearing Officer cannot believe otherwise than that registrant's objection fundamentally is to this change in life and habits. Doubtless registrant is sincere in feeling that he cannot incur this change and that scenes of violence and carnage which are so different from what he has been used to must be wrong, and hence something in which he cannot engage. The Hearing Officer cannot pretend from one conversation of two hours' duration to understand and to analyze all the complexities of registrant's mind and motives, nor can the Hearing Officer pretend to know how many of registrant's now expressed ideas are recent developments due to registrant's obvious desire to avoid military service; however, the Hearing Officer certainly cannot ascribe to registrant any particular religious feeling, whether of transcendent character or arising from love of fellow

men and desire to bring about a better state of social existence. Registrant merely feels that as for himself he is opposed to engaging in war and military activity, it is not apparent that he is concerned with what others may conclude to do in these respects. In conclusion, the Hearing Officer cannot and does not find that registrant is conscientiously opposed by reason of religious training and belief, to participation in war and military service, therefore, the Hearing Officer finds that registrant's objections are not sustained, and Recommends that such objections be not sustained.

E. S. WILLIAMS

Hearing Officer

For the Southern District of  
California."

"Dated: March 21, 1945.

"ESW:JM"

#### STIPULATION

Upon the admission of these five exhibits, it was stipulated and agreed between the parties, in open court, as follows:

"That the said exhibits show what was done, and the things that were done, on the days they reflect to have been done, and the classifications arrived at; that where a hearing was indicated therein to have been held, it was held; that the defendant was registered on the date shown; that he was within the territorial jurisdiction of the board; that the board was regularly and duly established and had jurisdiction over the defendant, and did conduct the hearings, made the classifications, from time to time,



as shown by the questionnaire; that notice of the Appeal Board's and the Department of Justice's action in respect to the defendant was duly given the defendant; that the order to report for induction was given to the defendant by mail; that he received it; and that he failed to report for induction on the date and hour required, and has since and does now fail and refuse to report for induction; and that the defendant is not now inducted, nor a member of the armed services, in any classification, of the United States, or any other country."

Mr. Carlson, the witness, continuing his testimony on direct examination, testified as follows:

He testified that Government's Exhibit No. 4 consists of letters which the local board received from the defendant in the regular course of the mails, and are a part of his file; and that defendant's claims that he was a conscientious objector, and that he should be exempt as an agricultural worker, were considered by the local board and the appeal board in arriving at the I-A classification.

#### Cross-Examination

He testified that on May 19, 1944, the defendant was ordered to report for a pre-induction physical examination at 6:30 A.M. on June 1, 1944, at 18451 Sherman Way in Reseda, California; and that defendant appeared at the time specified, passed his physical examination, and was found and duly certified as physically fit and acceptable by the Army for general military service on June 5, 1944.



The witness here identified, and there were taken from the defendant's Selective Service file and admitted in evidence as Defendant's Exhibits A, B, C, C-1, C-2 and D, the following:

#### DEFENDANT'S EXHIBIT A

Certificate of Fitness (DSS Form 218), dated June 5, 1944, signed by A. G. Harrison, Induction Station Commander, certifying that the defendant "having been given a preinduction Physical Examination was found: 1. Physically fit, acceptable by Army for general military service."

#### DEFENDANT'S EXHIBIT B

Report of Physical Examination (DSS Form 221), on which the above certificate of fitness was based.

#### DEFENDANT'S EXHIBIT C

Being the entire Selective Service file of the defendant, which was admitted with the agreement that any immaterial matter therein would be disregarded.

#### DEFENDANT'S EXHIBIT C-1

Special Form for Conscientious Objector (DSS Form 47), signed and filed by the defendant May 10, 1943, with his local board, and setting forth the following:

"1. Describe the nature of your belief which is

the basis of your claim made in Series I above. (Answer) I am conscientiously opposed to war and killing in any form as a violation of man's innate feeling and nature and his effort to lead a better life. War's waste of life and energies destroys all man's efforts toward a better natural and spiritual life, and I can take no part in it.

"2. Explain how, when and from whom or from what source you received training and acquired the belief which is the basis of your claim made in Series I above. (Answer) I have acquired my belief against war and killing (1) from early home training from my parents, (2) within the last few years thru seeing movies, such as 'All Quiet on the Western Front' and 'The Road Back.' I have fortified home training with conviction of my own.

"3. Give the name and present address of the individual upon whom you rely most for religious guidance. (Answer) John Thomson, 7914½ W. Norton Ave., Hollywood, Calif.

"4. Under what circumstances if any do you believe in the use of force? (Answer) I do not believe in the use of force to kill at any time. I do not believe in capital punishment. Force may be used to restrain, for instance, an insane, when this restraint is for the good of the individual or of society.

"5 Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions. (Answer) As far back as I can re-

member, I have never had a fight. I have never been allowed to own a toy gun. I have never owned a firearm of any kind. I have been taught 'Thou Shalt Not Kill,' not only in regard to man, but in regard to wild animals. To the best of my ability, I live up to the Ten Commandments.

"6. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where. (Answer) I expressed my views when I was thirteen in an editorial printed May 26, 1938, in 'La Cionica,' school paper of Bancroft Junior High School, Los Angeles, California, when I was editor of this paper."

Schools and colleges attended: 36th St. School, Forshay Junior High School, Bancroft Junior High School, Hollywood High School, and the University of California in Los Angeles, all public schools which are located in Los Angeles, Calif., between 1935 and 1942.

List of jobs held: Machine milker, Adohr Stock Farm, 18000 Ventura Blvd., Tarzana, Calif, 1942 to date.

Parents and Country of Birth: John J. Thomson and Oble L. Thomson, both born in U. S. A.

"Series IV—Participation in Organizations. 1. Have you ever been a member of any military organization or establishment? If so state the name and address of the same and give reasons why you became a member. (Answer) I was a member of

the R.O.T.C. at U.C.L.A. as membership in this organization was requisite, to my attendance at U.C.L.A.

“2. Are you a member of a religious sect or organization? (Answer) No.

“3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than religious or military: (Answer) I was a member of the Y.M.C.A. for approximately 4 mos. and performed no especial activities in or for the organization.”

#### DEFENDANT'S EXHIBIT D

Editorial “Peace on Earth Good Will Towards Men,” Dated May 26, 1938, published in the Bancroft Junior High School paper, reading as follows:

“Once a year a day is set aside on which we honor those who made the last great sacrifice for our country. We commemorate their deeds and ideals. It is fitting that on Memorial day we decorate the graves of our loved ones. But they are dead, they live only in memories. However, their ideals shall live forever, the end these soldiers strove for, the end we all strove for, Peace.

“Man is naturally peaceful. Often under the influence of political bosses he may be goaded into battle against a man for whom he holds no personal dislike. He knows only that he has been told to hate and kill this man. Therefore he picks up a gun and performs legalized murder. Live for your country



don't die for it! On this Memorial day let us re-dedicate our lives to aiding in making America a greater factor in a world peace movement."

Mr. Carlson, continuing his testimony on cross-examination, said:

The defendant was first given a 2-C classification by the local board on May 10, 1943; and this classification was continued on April 17, 1944, but the appeal agent for the government disagreed with this classification, and appealed the matter to the appeal board, which received the entire file, and reclassified the defendant I-A-O. The file was then transmitted back to the local board on May 8, 1944; and the local board then placed the defendant in class I-A-O in conformity with the appeal board's ruling.

The I-A-O classification is given conscientious objectors who in the opinion of the board should perform non-combat service in the armed forces, while the classification IV-E is given those who should go to a conscientious objectors' camp.

On May 15, 1944, the defendant, who had been notified of the new I-A-O classification, appeared before the local board requesting a IV-E classification; and the following day the local board sent the file of the defendant to Captain Harry A. Raider, Jr., Selective Service Coordinator for District No. 7, with a letter reading as follows:

"The local board is of the opinion that the registrant's religious background does not rate a IV-E classification. They also disagree with the appeal



board's I-A-O classification, since registrant checked both parts of Series X and signed Part B of Series I, in DSS Form 47. Please advise what action should be taken in this case."

The witness said the reason for sending the file to Captain Raider was that the local board could not change the classification given by the appeal board unless the file should be sent to the coordinator for review; and the local board was of the opinion, from questioning the registrant, that he had very little religious background and for that reason was of the opinion that the I-A-O or IV-E was an erroneous classification. The local board wanted to be sure that it was right. The local board was of opinion that the appeal board's classification was wrong on May 8, 1944, although at that time the local board accepted the I-A-O classification given by the appeal board. The local board's opinion was based on the defendant's questionnaire, his conscientious objector's Form 47, and his hearing before the local board on May 15, 1944, at which time he submitted a letter, and also on other data in the file.

The witness said that it did appear in his letter that the defendant said he had "no church affiliation at all"; and the defendant was asked on what he based his objections, and he said: "My conscience will not allow me to be under military service. My training for this was in my home and since I have been old enough to figure things out for myself I have been convinced of this belief."

Mr. McCall objected to the line of questioning

on the ground that it was immaterial, since the only material matter was whether the local board had ordered the defendant to report for induction, and he had failed to appear.

The Court: "I do not wish to indicate by any ruling now that I am agreeing with the defendant's position, but I do think that it is of sufficient moment that it deserves consideration, and rather than give it quick and brash judgment I will let the evidence go in and hear the argument on the point.

"For that reason I am going to overrule your objection and permit the evidence to go in, and if I conclude that you are correct it may be stricken or the same result will be reached in any event should I decide that you are right by a verdict of guilty."

Mr. Carlson's cross-examination continued:

The minutes of the meeting of the local board on May 15, 1944, at the time when the defendant appeared before it shows the following: "The local board is of the unanimous opinion that the religious background of the registrant does not warrant a IV-E classification."

The whole file was sent to Captain Raider, on May 16, 1944. Captain Raider sent it to the appeal board which on June 1, 1944, gave the defendant a IV-E classification; and later, on July 11, 1944, without returning the file to the local board, the appeal board reconsidered its own classification and

placed the defendant in 2-C. The file was then returned to the local board.

On September 6, 1944, the local board classified the defendant I-A. The defendant's deferment was up at that time, and the Selective Service System was in need of men between the ages of 18 and 26. Before calling up the 2-C's, the local board exhausted the 2-A's and 2-B's. For a time before that, the 2-C's, meaning agricultural workers, were practically immune from the draft, but the local board had later gotten orders to dip into the 2-C's in order to fill their quotas. On September 6, 1944, in order to fill its quota, the local board reclassified the defendant I-A. He was a single man, and not entitled to IV-E or a I-A-O classification.

After the defendant's 2-C classification on July 11, 1944, the local board sent the case to the U.S. D.A. war board for its investigation and recommendation, and they did not recommend a IV-E classification.

Following the defendant's I-A classification on September 6, 1944, the matter went to the Department of Justice which conducted a hearing and ruled that the defendant was not entitled to classification as a conscientious objector, as shown by Government's Exhibit No. 5. The witness said he did not believe that the defendant filed any kind of document pertaining to his religious belief between July 11, 1944, and September 6, 1944.

On November 5, 1944, the defendant requested a

hearing before the local board, and he appeared at a hearing on November 15, 1944. Then he wrote the local board a letter on November 28, 1944, and took an appeal on November 30, 1944. At the November 15, 1944, hearing no new evidence was submitted and the I-A classification was continued by the local board. The letter of November 28, 1944, was considered by the local board, and the classification continued. There has been no change in his classification since that time, either by the local board, the appeal board or the Department of Justice.

The board took into consideration the oral statements of the defendant when he appeared before the board on November 15, 1944. They were a repetition of the same statements he had previously made.

Here the Government rested its case.

### JACK EUGENE THOMSON

Called as a witness by and on behalf of the defendant having been first duly sworn, was examined and testified as follows:

He has been a milker for the last past two and one-half to three years; he decided to become one because he preferred this work, work consistent with his beliefs as a conscientious objector, to the work done in Civilian Public Service Camps, Civilian Public Service Camps being the place where conscientious objectors are sent to do work of "na-

tional importance". However, he has always been willing to go to a C.P.S. Camp if ordered, or to do any other work of national importance. He has no objection to serving in a hospital under civilian direction, fighting forest fires, or donating blood to the Red Cross.

He did not comply with the order for induction for "when a man joins the Army he has got to be ready to kill, and I don't think that I have a right to take another man's life. It is my belief that men all over the world are brothers, are related."

Further explaining this point he stated "In a word, I knew that I would be required to kill if I joined the Army, and I can't take the life of a fellowman. Therefore I didn't show up for induction . . . "life to me is sacred, it is something that is beyond the touch of mortals. It is something that is given to you, and another man's life is given to him. It is not for another mortal to take it from him."

"The Court: Have you ever been a member of any religious sect such as the Methodist, the Baptist, the Jewish church, or the Mohammedan, or the Four Square Gospel?

"The Witness: No, I haven't.

"The Court: Catholic or Episcopalian church, have you ever been a member of any of those?

"The Witness: No.

"The Court: Have you ever studied their doctrines?

"The Witness: Not deeply; no.



“The Court: Well, have you ever read the Bible?

“The Witness: Yes.

“The Court: Which Bible?

“The Witness: I have read the Christian Bible and parts of the Mohammedan, the Koran I believe it is.

“The Court: Do you read the Old Testament?

“The Witness: I have read parts of both.

“The Court: And the New Testament?

“The Witness: Yes, sir.

“The Court: When did you first begin to get these ideas?

“The Witness: Well, that is hard to say. It has been a long time ago.” (R. 96-87)

The witness said that he is the only child of his parents; that his father and mother do not hold adherence to any commonly recognized religion, such as Baptist, Methodist, or any others named by the Court; that he is not aware that his parents are students of the Bible; and that they never instructed him in the Bible, nor urged him to read it; nor had they ever urged him to read any other religious works or literature.

“The Court: They have given you no religious instruction at all then?

“The Witness: Not in the sense that they taught the doctrines of any of the recognized creeds, but my father especially has taught me, at least started me out on these lines, on these ideas which I now believe in, that life is sacred and that

no one man has a right to do an injustice to another, an injustice of any kind.”

The witness testified he had never attended with his parents any religious service, or Sunday school; and that the witness had never attended except “possibly once or twice.”

He first expressed himself on the subject of peace at the age of 13, when he was editor of the Bancroft (Jr.) High School Paper, when he wrote an essay on peace. The essay was later introduced in evidence as Defendant’s Exhibit D.

His parents belong to no church but gave him instruction along the lines of his present belief. He stated that his father’s objection to war was strictly humanitarian and the discussions they had were more or less of the nature of teacher and pupil rather than arguments. He testified that he always had opposition to war and that he regarded life as sacred. The following are excerpts from the testimony on the nature of his beliefs:

“The Court: While you are on that, you stated a while ago that the basis of your philosophy, if it may be called that, or your religious belief, is that you regard life as something sacred and you have no right to take any life which is sacred, what do you mean by a sacred gift?

“The Witness: It is a gift from something beyond man, some power beyond man, and as such a gift no man has a right to touch it.

“The Court: Do you in your religious belief

have a concept which is equivalent to the Christian concept of God?

“The Witness: Yes, I have.

“The Court: What do you call it?

“The Witness: Well, I never——

“The Court: Do you call it God?

“The Witness: I never put a name on it. It is just power. I simply thought of it and referred to it in my thoughts. I haven’t discussed my religious feelings with many people, and I have not been called upon to put a name on it.

“The Court: Well, in your own thinking aren’t you called upon to define it or, for lack of a definition, to give it a name?

“The Witness: I have accepted, since the term is always used in connection with this power, the term of God.

“The Court: What is your concept of God then?

“The Witness: Well, God is a power that exists.

“The Court: Do you regard it within the power of humans to conceive actually what this power is?

“The Witness: No, I don’t think so. I think that the only connection which the human mind has with God, is the manifestation of the voice of God which I think is conscience, something that gives you direction, tells you this is right or that is wrong, that you shouldn’t do that.

“The Court: Go ahead.

“By Mr. Wirin:

“Q. Now in the hearing officer’s report, which

contains a summary of the FBI report which was based upon interviews with FBI agents, it is reported that one of the persons thought that you were an agnostic. Are you an agnostic?

“A. No. Of course that depends upon your definition of being an agnostic. I do believe in a power beyond man, a power which I think of as God.

“Q. Now also in one of the FBI reports there is a reference to a statement by someone who knew you, that he thought you were an atheist. Are you an atheist?

“A. No, that is not correct.

“Q. There is a reference—it is on page 14 of the report—that one person who knew you thought that you were not an atheist, that you believe in a Supreme Being and immortality. Do you believe in a Supreme Being and immortality?

“A. I do believe in a Supreme Being. As to immortality, I haven't decided yet. (R. 102, 104)

“Q. Now does this belief of yours in a Supreme Being have any relationship to your attitude toward war?

“A. Yes.

“Q. What is it?

“Mr. McCall: Your Honor please, may I make one more objection, and that is this, that even if it were permissible to examine into the correctness or incorrectness of the classification given by the local board, and if this were a habeas corpus hearing, additional evidence such as this would not be admissible. It would be tried then upon the record

of the local board as to what was before them. It wouldn't be a re-trial before your Honor.

"The Court: I think probably you are correct. I will let him put his evidence on subject to the same motion.

Additionally he testified:

"A. Well, as I said, a man's conscience is the voice of God within him, and what your conscience dictates to you is a command from this Supreme Being.

"Q. What is that command to you in connection with war or participation in war?

"A. The demand to me was "Thou shalt not kill."

"Q. Where does that come from, the original phrase?

"A. The original phrase of course comes from the Bible.

"Q. In other words, you do accept that part of it?

"A. Yes, I do. (R. 105)

On the subject of his religious training:

"Q. What do you mean by training you in pacifism?

"A. Essentially it was my father's teaching that I should live by the Golden Rule.

"Q. What is the Golden Rule as you understand it?

"A. The Golden Rule was that I should do unto other men as I expected and wanted them to do unto me.



"Q. Do you know the origin of the Golden Rule, where it first appears?

"A. No, I am not acquainted with that.

"Q. Was it stated by some religious person, do you know?

"A. I know that if not the text of that, a teaching very similar to it was given by Christ.

"Q. Now in this statement you said "They (referring to your parents) taught me that full life is obtained only by helping one's fellows." Then you said, "I am not a member of any sect, yet I look at the life of Christ as a perfect example of man's behavior towards his fellows. I know if Jesus were alive today he would stand beside me protesting against war." Was that your opinion at that time?

"A. Yes.

"Q. Has that been your opinion during this entire period?

"A. Yes, it is my opinion now. (R. 106)

"The Court: Has it ever occurred to you that perhaps your mind might change?

"The Witness: Yes, it changes all the time.

"The Court: What is your objection to joining the Army and taking your chance on being assigned to non-combatant work?

"The Witness: Well, I think that to come under military supervision in any manner is to give your sanction to militarism, which I don't wish to do. (R. 107)

The witness said he was aware that in the United States Army there are both Quakers and Seventh

Day Adventists engaged in non-combatant service, who have such beliefs as the defendant professes, fundamentally, in that they hold it wrong for a man to take the life of another under any circumstances; and that they find their beliefs consistent with non-combatant service; but that he departs from their belief in that "I feel that to join the Army, to accept military direction, is to vote for war, to condone it, which I do not wish to do." He said he did not condemn the work of soldiers, for them. "I think that they, I presume at least, are following the dictates of their conscience and whatever man decides to do that is his decision and should be respected, and I do respect it." He said he would be willing to help one who had been injured in connection with his participation in the Army, "if you would be permitted to help such a person under civilian direction rather than in the Army."

The defendant said he was not willing to accept a I-A-O classification, "because in such event I would be placed under military jurisdiction"; and that he had made that statement to the local board; that Mr. Carlson of the local board had pointed out this difference between a I-A-O and a IV-E classification.

"Mr. Wirin: Did you give any reason why you couldn't or wouldn't accept military direction?

"A. Yes.

"Q. What did you say?

"A. I believe I stated before the recess that I

think to accept military jurisdiction or military direction is to condone war as an institution, and I won't do that."

The defendant testified he had no resentment or animosity towards soldiers but on the contrary respects their right to make decisions for themselves. (R. 116)

### Cross-Examination

Defendant left college principally to work in a dairy to secure a draft deferment (R. 119). When at college he was in the ROTC at the University of California at Los Angeles and was a Corporal (R. 124).

Defendant testified that he had never given any thought to whether soldiers will be punished in any manner, in any life after death, for participating in, or killing other men during a war; and that he has no conviction or thought as to whether there is, in the after life, any punishment administered to one who kills.

"Q. Well, you feel actually, don't you, that if you were in the Army and you were compelled to go up in the front line and you met the foe and you killed a man, or two, or five, or a dozen, that there would be no punishment in the life hereafter for you for doing that?

"A. That is right.

"Q. You don't feel that?

"A. I don't feel that I would face punishment; no."

The defendant said he had never expressed any objections to the officials at the University of California at Los Angeles about participating in the ROTC; and that he suspected that men in the Army who have to kill people have the same revulsion for it that he, the defendant, has. He is not married, has no dependents, and is 20 years of age.

### Re-direct Examination

He was a member of the ROTC because it was a requisite to his attendance to the University of California at Los Angeles. Though other schools were available he went to UCLA because it was close to home and it has a good academic standing; he saw nothing in the military drill that was contrary to his conscience because he was not to be called on to kill anyone.

This was all the evidence in the case.

The defendant rested and the case was argued by counsel.

During argument of counsel, the following occurred between defense counsel and the Court:

“Mr. Wirin: We think that in this case the judgment of not guilty ought to be entered if the Court has the power of review. I would like to go into that, if I may, first briefly and then perhaps more extensively if the Court permits it.

“We say that a broad or liberal definition of “religious training and belief” should have been given by the selective service agencies and should

be given by this Court, as was given by the Second Circuit in the Downer case and in the Kauten case.

“The Court: I don’t think the record shows that they failed to do that. In the hearing here they inquired into all his background, his neighbors, friends, high school associates, his personal beliefs, conversations at dinner tables and his foreman, and they inquired from everyone who would ordinarily have expressed to them a man’s views, what this man’s views were, to see what his religious beliefs were. And they came to the conclusion that his belief was not based on religious training and belief.

In announcing the verdict and decision, the Court said:

“The Court: I have admitted evidence in the case and indicated that a ruling would be made. I will now affirm the rulings which I have heretofore made overruling the objection of the Government.

“It seems to me that even though there is some appeal in reason to defense counsel’s distinction between this case and the Falbo case, that I am bound by the Flakowicz case, 146 F. (2d) 874, Cert. Den. 65 S. Ct. 1086, 89 L. Ed. 1069, 324 U. S.—). While it is not in this Circuit, it is of the Second Circuit and I believe that I am bound by it. That reason alone would be sufficient to sustain a verdict of guilty.

“However, the case will probably find its way into the higher courts and they will probably ex-



press a statement that the lower court should not have touched on its views. Assuming that the Flakowicz case would not be followed in this Circuit, the question then arises as to the extent of review which this Court has the power to make upon this proceeding, a criminal proceeding, where a not guilty plea is entered and the defendant is put on trial. I do not believe that the Court could go any further in this proceeding than it could in a habeas corpus proceeding which, without any extended statement of the law in connection with it, probably would be summed up to say that a court is limited to determining whether or not the local board and the appeal board in this case, before which the case regularly and statutorially got, and who had the statutory power to make the decision, were arbitrary and capricious, which describes generally the various elements that must be taken into consideration.

“Assuming therefore that I had that power to review, I cannot say that the local board or the appeal board acted arbitrarily or capriciously. I think that they extended a complete opportunity to the defendant here to be heard, that they did hear him, that they took everything into consideration and did not limit their inquiry to merely whether or not he was a member of any church or read any particular religious book or Bible, or any other book which espouses religious views or beliefs, but that they took into consideration everything that he had to offer, as well as his conduct, and life in

the past, and his general attitudes as expressed by his conduct. Therefore I would have to find the defendant guilty in the event that the Flakowicz case is not followed by the Ninth Circuit because I cannot find that the draft boards were arbitrary and capricious.

“On the third point raised, which, in reality, was raised first, the construction of the statute, that is, the phrase “religious training and belief,” I think that I have expressed myself on that during the course of the argument, but in order that it may be stated in this summary form, again I will state that I do not believe that the record shows a misconstruction of the statute. The boards did take into consideration everything about this man which he had to offer and did not limit themselves to any of the conventional means of getting religious training.

“That reviews the points that have been raised. I don’t think that I have the power to weigh the evidence de novo. But in the event that the Circuit should hold that this Court had the power and the duty, I have already indicated that the motions to strike if made would be denied and the rulings I have heretofore made would be followed; but in that event I think that I would be constrained to hold, were this Court held to be the trier of the fact, that this young man is not conscientiously opposed to war because of religious training and belief. So on the merits, were I trying it on the merits, I am afraid I would have to find him guilty.

I think he possesses and exhibits perhaps a little more bewilderment than is ordinarily possessed by young people who are about his age concerning the recurrent and wonderful thing of youth, questioning everything that has gone before; I think perhaps that there are some things about which he has not yet made up his mind, and perhaps some things which he will never so long as he lives reach an exact evaluation of, as I believe every person with an inquiring mind should. But I don't believe that I could say, were I trying it on the merits, that his objection to becoming a member of the armed forces and his violation of the law in this case was due to his religious training and belief.

"I realize that it is not incumbent upon the Court, when the jury is waived, to make any statement such as I have made here, explaining its views and that it is to be expected that the answer will be found in the words "guilty" or "not guilty." But I have done so in this case in order to give counsel, as I would want to do were I representing either the Government or the defendant, my reasons; because if my reasons are not good, then my judgment is not good.

"The judgment is guilty as charged."

The foregoing Bill of Exceptions, together with the exhibits and the various stipulations therein mentioned, contains all the evidence adduced on the trial of this cause and correctly shows the various proceedings during the trial. The same being true and correct and being duly presented within the

time fixed by law and the proper and seasonable extensions of time duly granted, it is accordingly settled and allowed.

Dated: October 23, 1945.

PEIRSON M. HALL,

United States District Judge

Approved both as to form and substance:

CHARLES H. CARR

United States Attorney

JAMES M. CARTER and

JAMES C. R. McCALL, Jr.

Assistant U. S. Attorneys

By JAMES C. R. McCALL, Jr.

Attorneys for Appellee.

A. L. WIRIN and J. B. TIETZ

By J. B. TIETZ

Attorneys for Appellants.

[Endorsed]: Filed Oct. 22, 1945.

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[Endorsed]: No. 11113. United States Circuit Court of Appeals for the Ninth Circuit. Jack Eugene Thomson, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California Central Division.

Filed November 23, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11113

JACK EUGENE THOMSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ADOPTION OF ASSIGNMENTS OF ERRORS  
AS POINTS ON APPEAL

Appellant adopts as his Points on Appeal the Assignments of Errors appearing in the Transcript of Record; The parts of the record necessary for the consideration of said Points are the parts enumerated in the Praeipce to the Clerk of the United States District Court, filed and served on November 14, 1945 and appearing in the Transcript of Record and, additionally, the remainder of the exhibits that were introduced in evidence.

A. L. WIRIN and J. B. TIETZ

By J. B. TIETZ

Attorneys for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed December 3, 1945. Paul P. O'Brien, Clerk.





No. 11,113

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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JACK EUGENE THOMSON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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APPELLANT'S OPENING BRIEF.

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*Attorneys for Appellant.*

OCT 29 1938

PAUL P. O'BRIEN,

CLERK





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No. 11,113  
IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

JACK EUGENE THOMSON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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APPELLANT'S OPENING BRIEF.

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A.

**Jurisdiction.**

This appeal is taken pursuant to the provisions of 18 U. S. C. 688 and Rule 37 of the New Federal Rules of Criminal Procedure.

B.

**Preliminary Statement.**

This appeal brings before this court once again the question as to the proper judicial construction of the phrase "religious training and belief" in Sec. 5 g of the Selective Training and Service Act of 1940.

The question was once before considered by this court in No. 10953, *Berman v. United States*, in which the court was divided. Petition for writ of certiorari in that case

has been filed with the United States Supreme Court. No word on whether certiorari will or will not be granted has yet been received from that court.

### C.

#### Statement of the Case.

The appellant registered under the Selective Training and Service Act of 1940; requested classification as a conscientious objector; was so classified at one time as 1-A-0 and thereafter reclassified as 1-A; took and passed his physical examination and was found to be acceptable to the armed forces; was ordered to report to his local Board for induction but refused so to do. Thereafter he was charged under the Act, 50 U. S. C. A. App., Sec. 311, with refusing to obey a Board order, was tried before the District Judge and convicted.

Trial was held on July 12 and 13, 1945, before the decision of the United States Supreme Court in *Smith v. United States*, and *Estep v. United States*, 327 U. S. 114, 90 L. Ed. 405 (1946).

The ruling by the court below to the effect that there was no misapprehension of the law in the action of the Selective Service Agencies in reviewing defendant's classification as a conscientious objector was based on the concept that religious training and belief must mean religion as exemplified by belief in God as such and in membership in some church.

Thus, it was along these lines that the court examined the defendant [R. pp. 56-59]:

“The Court: Have you ever been a member of any religious sect such as the Methodist, the Baptist,

the Jewish church, or the Mohammedan, or the Four Square Gospel?

The Witness: No, I haven't.

The Court: Catholic or Episcopalian church, have you ever been a member of any of those?

The Witness: No.

The Court: Have you ever studied their doctrines?

The Witness: Not deeply; no.

The Court: Well, have you ever read the Bible?

The Witness: Yes.

The Court: Which Bible?

The Witness: I have read the Christian Bible and parts of the Mohammedan, the Koran I believe it is.

The Court: Do you read the Old Testament?

The Witness: Yes, sir.

The Court: When did you first begin to get these ideas?

The Witness: Well, that is hard to say. It has been a long time ago."

The appellant said that he is the only child of his parents; that his father and mother do not hold adherence to any commonly recognized religion, such as Baptist, Methodist, or any others named by the court; that he is not aware that his parents are students of the Bible; and that they never instructed him in the Bible, nor urged him to read it; nor had they ever urged him to read any other religious works or literature. [R. p. 57.]

"The Court: They have given you no religious instruction at all then?

The Witness: Not in the sense that they taught the doctrines of any of the recognized creeds, but my father especially has taught me, at least started me out on these lines, on these ideas which I now believe in, that life is sacred and that no man has a right to do an injustice to another, an injustice of any kind."

The appellant testified he had never attended with his parents any religious service, or Sunday school; and that he had never attended except "possibly once or twice." [R. p. 58.]

He first expressed himself on the subject of peace at the age of 13, when, as editor of the Bancroft Junior High School (Los Angeles, California) Paper, he wrote an essay on peace. The essay was later introduced in evidence as Defendant's Exhibit D. [R. p. 58.] (The essay appears on page 50 of the Record.)

His parents belong to no church but gave him instruction along the lines of his present belief. He stated that his father's objection to war was strictly humanitarian and the discussions they had were more or less of the nature of teacher and pupil rather than arguments. He testified that he always had opposition to war and that he regarded life as sacred. The following are excerpts from the testimony of the nature of his beliefs [R. p. 58]:

"The Court: While you are on that, you stated a while ago that the basis of your philosophy, if it may be called that, or your religious belief, is that you regard life as something sacred and you have no right to take any life which is sacred, what do you mean by a sacred gift?

The Witness: It is a gift from something beyond man, some power beyond man, and as such a gift no man has a right to touch it.

The Court: Do you in your religious belief have a concept which is equivalent to the Christian concept of God?

The Witness: Yes, I have.

The Court: What do you call it?

The Witness: Well, I never—

The Court: Do you call it God?

The Witness: I never put a name on it. It is just power. I simply thought of it and referred to it in my thoughts. I haven't discussed my religious feelings with many people, and I have not been called upon to put a name on it.

The Court: Well, in your own thinking aren't you called upon to give it a name?

The Witness: Well, God is a power that exists.

The Court: Do you regard it within the power of humans to conceive actually what this power is?

The Witness: No, I don't think so. I think that the only connection which the human mind has with God, is the manifestation of the voice of God which I think is conscience, something that gives you direction, tells you this is right or that is wrong, that you shouldn't do that."

Appellant's position is fairly set forth in his answer to the Special Form for Conscientious Objectors (D. S. S. Form 47) filed by the appellant with his local board [R. pp. 47-49]:

"1. Describe the nature of your belief which is the basis of your claim made in Series I above. (An-



swer) I am conscientiously opposed to war and killing in any form as a violation of man's innate feeling and nature and his effort to lead a better life. War's waste of life and energies destroys all man's efforts toward a better natural and spiritual life, and I can take no part in it.

"2. Explain how, when and from whom or from what source you received training and acquired the belief which is the basis of your claim made in Series I above. (Answer) I have acquired my belief against war and killing (1) from early home training from my parents (2) within the last few years thru seeing movies, such as 'All Quiet on the Western Front' and 'The Road Back.' I have fortified home training with conviction of my own.

"4. Under what circumstances if any do you believe in the use of force? (Answer) I do not believe in the use of force to kill at any time. I do not believe in capital punishment. Force may be used to restrain, for instance, an insane, when this restraint is for the good of the individual or of society.

"5. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions. (Answer) As far back as I can remember, I have never had a fight. I have never been allowed to own a toy gun. I have never owned a firearm of any kind. I have been taught 'Thou Shalt Not Kill,' not only in regard to man, but in regard to wild animals. To the best of my ability, I live up to the Ten Commandments."

In the hearings before the Hearing Officer the testimony was that the appellant was sincere in his belief and was not seeking a classification as conscientious objector because of fear or because of a desire not to do his duty but rather because he inherently and fundamentally believed in his own conscience that he could not engage in war.

Even when appellant was as young as 13 years he gave public expression to this feeling of conscience then just budding and thirsting for expression in his breast. Said the appellant [R. p. 50]:

Editorial "Peace on Earth Good Will Towards Men," dated May 26, 1938, published in the Bancroft Junior High School paper, reading as follows:

"Once a year a day is set aside on which we honor those who made the last great sacrifice for our country. We commemorate their deeds and ideals. It is fitting that on Memorial day we decorate the graves of our loved ones. But they are dead, they live only in memories. However, their ideals shall live forever, the end these soldiers strove for, the end we all strove for, Peace.

"Man is naturally peaceful. Often under the influence of political bosses he may be goaded into battle against a man for whom he holds no personal dislike. He knows only that he had been told to hate and kill this man. Therefore he picks up a gun and performs legalized murder. Live for your country don't die for it! On this Memorial day let us re-dedicate our lives to aiding in making America a greater factor in a world peace movement."

And it appears that nonetheless he did not belong to any church, he had a feeling closely akin to the usual understanding of what "Religion" is.

In further examinations before the court the appellant testified [R. pp. 61-62]:

"A. Well, as I said, a man's conscience is the voice of God within him, and what your conscience dictates to you is a command from this Supreme Being.

Q. What is that command to you in connection with war or participation in war? A. The demand to me was 'Thou shalt not kill.'

Q. Where does that come from, the original phrase? A. The original phrase of course comes from the Bible.

Q. In other words, you do accept that part of it? A. Yes, I do."

On the subject of his religious training [R. p. 61]:

"Q. What do you mean by training you in pacifism? A. Essentially it was my father's teaching that I should live by the Golden Rule.

Q. What is the Golden Rule as you understand it? A. The Golden Rule was that I should do unto other men as I expected and wanted them to do unto me.

Q. Do you know the origin of the Golden Rule, where it first appears? A. No, I am not acquainted with that.

Q. Was it stated by some religious person, do you know? A. I know that if not the text of that, a teaching very similar to it was given by Christ.

Q. Now in this statement you said 'They (referring to your parents) taught me that full life is ob-

tained only by helping one's fellows.' Then you said, 'I am not a member of any sect, yet I look at the life of Christ as a perfect example of man's behavior towards his fellows. I know if Jesus were alive today he would stand beside me protesting against war.' Was that your opinion at that time? A. Yes.

Q. Has that been your opinion during this entire period? A. Yes, it is my opinion now.

The Court: Has it ever occurred to you that perhaps your mind might change?

The Witness: Yes, it changes all the time.

The Court: What is your objection to joining the Army and taking your chance on being assigned to non-combatant work?

The Witness: Well, I think that to come under military supervision, in any manner is to give your sanction to militarism, which I don't wish to do."

### Opinion of the Court Below.

No opinion of the District Court has been published. The trial judge's reasoning in the matter however appearing in his remarks from the bench [R. pp. 66-69] in settling and allowing the Bill of Exceptions.

### D.

### Questions Presented.

#### I.

Did the District Court erroneously interpret the meaning of the phrase "religious training and belief" by restricting its meaning to the orthodox religious training by membership in a church and by a belief in an actual, material, personal "God"?

II.

Should a new trial be granted or the cause remanded because the defendant was not permitted to present as a defense evidence that he was a conscientious objector although he had submitted to all processes on the road to induction except actual induction itself?

E.

**Specification of Errors.**

Appellant relies upon the Assignment of Errors heretofore filed [R. pp. 19-20].

F.

**Argument.**

The legal issues in this case involving the same points heretofore presented to this court in *Berman v. United States of America*, No. 10953, and petition for writ of certiorari having been filed in that case with the Supreme Court of the United States, it is felt that the same arguments there urged are applicable here. The argument appears from page 7 through page 45 in Appellant's Opening Brief before this court in the *Berman* case and are hereby adopted as the argument in this case and again urged on this court.

Dated October 28, 1946.

Respectfully submitted,

A. L. WIRIN,

FRED OKRAND,

*Attorneys for Appellant.*



No. 11113.

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

JACK EUGENE THOMSON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLEE'S BRIEF.

---

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FILED

JAN 20 1947



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No. 11113.

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

JACK EUGENE THOMSON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLEE'S BRIEF.

---

**Jurisdictional Statement.**

A. The United States District Court for the Southern District of California had jurisdiction of the appellant and subject matter contained in the one count indictment, under the provisions of United States Code, Title 50, Appendix, Section 311, making it unlawful for any person knowingly to fail or neglect to perform any duty required of him under the provisions of the Selective Training and Service Act of 1940, as amended.

B. This court has jurisdiction of the appeal under the provisions of United States Code, Title 28, Section 225(a) and (d).



### Statement of the Case.

The appellant was indicted for violation of the Selective Training and Service Act of 1940, as amended. The indictment charged that the appellant was given a notice and an order by his Local Board to report for induction into the armed forces of the United States on May 24, 1945, and that said defendant did at said time and place knowingly and unlawfully fail and neglect to perform a duty required of him under said Act and the rules and regulations promulgated thereunder, that is to say, the defendant did then and there knowingly and unlawfully fail and neglect to report for induction into the armed forces of the United States, as so notified and ordered to do. [R. 3.]

This is an appeal by appellant Jack Eugene Thomson, from a judgment after trial in the District Court and a finding of guilty of the offenses charged in the indictment. Appellant was committed to the custody of the Attorney General or his authorized representative for imprisonment for one year in a federal penitentiary to be designated by the Attorney General, and, in addition thereto, to pay a fine unto the United States of America in the sum of \$1,000.00 and to stand committed until paid. A jury was waived in the District Court by the respective parties with the consent of the trial judge. [R. 2.]

## Summary of the Evidence.

The appellant registered under the Selective Training and Service Act of 1940; requested classification as a conscientious objector; was so classified at one time as 1-A-O and thereafter reclassified as 1-A; took and passed his physical examination and was found to be acceptable to the armed forces; was ordered to report to his local Board for induction but refused to do so. Thereafter he was charged under the Act, 50 U. S. C. A., App. §311, with knowingly and unlawfully failing and neglecting to report for induction into the armed forces, and was tried in the District Court without a jury and was convicted.

On appellant's registration card [Government's Exhibit No. 1] appellant stated his name, his place of residence, mailing address, and gave his age as 18, and his place and date of birth as April 21, 1925, Los Angeles, California. The date of registration was April 21, 1943. [R. 24.]

In appellant's Selective Service Questionnaire [Government's Exhibit No. 2], questions in series VII, "For Minister, Or Student Preparing For Ministry," were checked in ink by appellant.

The following printed statements in appellant's Selective Service Questionnaire in Series X were checked affirmatively by appellant:

"1. By reason of religious training and belief, I am conscientiously opposed to war in any form and therefore claim exemption from combat training and service.

"2. I am also, by reason of religious training and belief, conscientiously opposed to participation in non-combatant military service and request, in the event

I am found to be conscientiously opposed thereto, that, in lieu of my induction into the land or naval forces of the United States, I be assigned to work of national importance under civilian direction; and I agree to perform such work and conform to all rules and directions made and given with reference thereto by the President of the United States or by such person as he may designate or appoint for such purpose pursuant to such rules and regulations as he may prescribe."

Instructions printed over these statements were:

"Only registrants who are conscientiously opposed to combatant or non-combatant military service by reason of religious training and belief shall fill in this series, and shall obtain from the Local Board a special form (Form 47) on which to give substantial evidence of conscientious objection. The Local Board, after considering all other classes of deferment, will determine whether the registrant shall be classified as a conscientious objector on the basis of the claim made and the information contained in the special form." [R. 25-26.]

Under Registrant's Statement Regarding Classification, appellant wrote:

"2-C is the usual classification of milkers on this dairy and I think that I should be given this classification before my Class IV Classification is considered." [R. 26.]

On May 10, 1943, the Local Board classified the appellant 2-C.

On May 1, 1943, appellant was sent his notice of classification (Form 57). This entry appearing on appellant's Selective Service Questionnaire was apparently inadvertently omitted from the Transcript of Record. [R. 27.]

The Record is also inaccurate in that the entry appearing opposite 4-18-44 should appear opposite 4-17-44, and *vice versa*.

After appellant was reclassified 2-C and notified thereof, Louis S. Frye, Appeal Agent, took an appeal on behalf of appellant, dated 4-22-44. The Board of Appeals reclassified appellant 1-A-O and he was sent notice of the new classification on May 8, 1944. On May 15, 1944, he appeared before the Local Board requesting a 4-E classification and submitted a written statement to the Board in the form of a letter. Upon appeal to the Board of Appeal, appellant was classified 4-E but this classification was reconsidered by the Board of Appeal and the classification was changed to 2-C.

On September 6, 1944, appellant was reclassified 1-A by the Local Board on the ground that there was not sufficient evidence in the file to justify a 4-E classification. [R. 27.]

On September 20, 1944, registrant appeared before the Board, and, on the ground that no new evidence was submitted, he was continued in classification 1-A.

On November 28, 1944, appellant appealed his classification, and the Board of Appeal reviewed the file and decided that he should not be classified in any of the classes set forth in 623-1 of the Regulation and on January 3, 1945, ordered that the entire file be transmitted to the Department of Justice for the purpose of securing an advisory recommendation. Pursuant to notice, appellant personally appeared at a hearing of the Department of Justice on March 20, 1945. [R. 33.]

The report of that hearing, as set forth in the Transcript of Record [R. 32-45] indicates that the appellant



stated that he had never been a member of any church or religious organization and that his parents had not been members of any religious organizations. He stated that he knew very little about the Bible, that he had seldom read the Bible, and that he did not know any of the books of the Bible. He also stated that he had not been interested or active in any social welfare work or organization. While at the University of California in Los Angeles he did not participate in any of the activities of the religious welfare center conducted in that college community. Dr. E. P. Ryland, who appeared with appellant, as a witness in appellant's behalf, stated that appellant was not a religious conscientious objector in the ordinary sense, although he felt that the appellant was sincere in his attitude. [R. 36.]

Another reference [R. 38] stated that he had never heard appellant discuss religion and did not know whether or not he believed in God. Another witness testified similarly. [R. 38-39.] One stated that appellant was self-centered and put his own interest before those of others; that on one occasion appellant had gone into the cook house and had taken all the bananas and had eaten them himself, bananas being a scarce item of diet for the men on the farm at which appellant was employed, and that on this occasion appellant's demeanor was "The hell with anyone else." Appellant himself stated that he had never made any contribution to the Red Cross Blood Bank because, working in the dairy as he was, he needed all his strength. [R. 34.] The fellow employee further stated that appellant bragged that he was an agnostic and that he was only working at the dairy to secure a deferment as an essential agriculture worker, and that appellant had



never mentioned his opposition to war was based on the taking of human life, but always argued that the United States was wrong to be in the war and had no business to be in it in the first place.

At the same hearing a party who had been intimate with appellant as a neighbor stated that he knew no reason why appellant would be working in a dairy if it were not to gain the advantage of deferment, as registrant had made good grades in the University and his father was financially able to pay registrant's expenses there; that he had not talked recently with appellant concerning his religious beliefs, but that previously the appellant had professed to be an atheist, and that neither he nor his parents belong to any church, and that appellant in discussions of the international situation had expressed himself as being anti-British. [R. 41-42.]

Another party stated that appellant, one night at dinner, had stated that he was an atheist. [R. 42.]

A former intimate friend of appellant stated that appellant, in the summer of 1943, told him that appellant did not believe in the principles of this war and that he did not want to be a tool and that he did not like the political set up, and that appellant, at the time, was very bitter in his denunciation of the war from a practical standpoint. [R. 43.]

As a result of the foregoing testimony and other testimony not summarized here [R. 32-45] the hearing officer concluded that appellant's views as to war were not based upon any religious feeling and further that he was not conscientiously opposed by reason of religious training and belief to participation in war and military service. He,

therefore, recommended that appellant's objections be not sustained. [R. 44-45.]

Appellant's Exhibit No. C-1, in the trial below, The Special Form For Conscientious Objector, interrogates the appellant as to the nature and sources of his views in opposition to war. The answers are almost totally devoid of anything which would attribute his views to *religious* training and belief. He answers the first question by saying that he is conscientiously opposed to war and killing in any form as a violation of man's innate feeling and nature in an effort to lead a better life. He further stated that "War's waste of life and energies destroys all man's efforts toward a better natural and spiritual life, and I can take no part in it." [R. 48.]

Answer No. 2 is that he acquired his beliefs from his home training, from his parents, neither of whom is shown to have professed any religious belief or to have belonged to any religious organization, and from seeing movies such as "All Quiet On The Western Front" and "The Road Back." [R. 48.]

In answer to question No. 3, he stated he relied mostly for religious guidance upon John Thomson, presumably his father, who, it is indicated, was not shown to have professed any religious belief or associated with any religious group.

In answer to question No. 5, he stated that to the best of his ability he lives up to the Ten Commandments, including the one "Thou Shalt Not Kill." [R. 48-49.] (It might be noted parenthetically that several of the Ten Commandments are included in man-made penal codes and carry heavy penalties for their violation.)

In answer to question No. 6, which asks whether he has ever given public expression to the views therein expressed, he replied that he expressed his views in an editorial printed in his school paper in 1938. [R. 49.] That editorial is set forth in full in the Record. [R. 50-51.] No indication is professed in that editorial that opposition to war should be on a religious basis, but appears to be based upon the political views of the Socialist Party that wars are brought about by political bosses.

Under cross-examination, Government's witness Hugo A. Carlson, Chairman of Local Board No. 176, Reseda, California, testified that on November 5, 1944, the appellant requested a hearing before the Local Board and that he appeared in a hearing on November 15, 1944; that at the hearing on November 15, 1944, no new evidence was submitted and the I-A classification was continued by the Local Board. He further testified to the receipt of a letter dated November 28, 1944, and stated that this letter was considered by the Local Board and that the classification was continued. He further testified that the Board took into consideration the oral statements of appellant when he appeared before the Board on November 15, 1944, and testified that they were merely a repetition of the same statements he had previously made. [R. 54-55.]

The appellant, when examined by the Court, testified that neither he nor his parents adhered to any commonly recognized religion such as Baptist, Methodist, or any other named by the Court; that he was not aware that his parents were students of the Bible, that they never

instructed him in the Bible, nor urged him to read it, nor had they ever urged them to read any other religious works or literature; he further stated that they had given him no instruction at all in the sense that they taught the doctrines of any of the recognized creeds. He testified that his parents belong to no church but gave him instruction along the lines of his present belief and stated that his father's objection to war was strictly humanitarian.

During the argument of counsel at the close of the case, appellant's counsel argued:

"We say that a broad or liberal definition of 'religious training and belief' should have been given by the selective service agencies and should be given by this Court, as was given by the Second Circuit in the Downer case and in the Kauten case.

The Court: I don't think the record shows that they failed to do that. In the hearing here they inquired into all his background, his neighbors, friends, high school associates, his personal beliefs, conversations at dinner tables and his foreman, and they inquired from everyone who would ordinarily have expressed to them a man's views, what this man's views were, to see what his religious beliefs were. And they came to the conclusion that this belief was not based on religious training and belief." [R. 65-66.]

In announcing the verdict and decision the Court, in part, declared:

"Assuming therefore that I had that power to review, I cannot say that the local board or the appeal



board acted arbitrarily or capriciously. I think that they extended a complete opportunity to the defendant here to be heard, that they did hear him, that they took everything into consideration and did not limit their inquiry to merely whether or not he was a member of any church or read any particular religious book or Bible, or any other book which espouses religious views or beliefs, but that they took into consideration everything that he had to offer, as well as his conduct, and life in the past, and his general attitudes as expressed by his conduct. Therefore I would have to find the defendant guilty in the event that the Flakowicz case is not followed by the Ninth Circuit because I cannot find that the draft boards were arbitrary and capricious.

“On the third point raised, which, in reality, was raised first, the construction of the statute, that is, the phrase ‘religious training and belief,’ I think that I have expressed myself on that during the course of the argument, but in order that it may be stated in this summary form, again I will state that I do not believe that the record shows a misconstruction of the statute. The boards did take into consideration everything about this man which he had to offer and did not limit themselves to any of the conventional means of getting religious training.

“That reviews the points that have been raised. I don’t think that I have the power to weigh the evidence *de novo*. But in the event that the Circuit should hold that this Court had the power and the duty, I have already indicated that the motions to



strike if made would be denied and the rulings I have heretofore made would be followed; but in that event I think that I would be constrained to hold, were this Court held to be the trier of the fact, that this young man is not conscientiously opposed to war because of religious training and belief. So on the merits, were I trying it on the merits, I am afraid I would have to find him guilty."

For the full remarks of the Court, see the Transcript of Record, pages 65-69.

The Judgment was guilty as charged. [R. 69.]

### **Questions Presented by This Appeal.**

1. May a registrant who has knowingly failed and neglected to report to the induction station as ordered so to do by his Local Board enter as a defense against a criminal prosecution the ground that his classification was erroneous?

2. Did the District Court erroneously interpret the meaning of the phrase "religious training and belief"?

3. [Appellant states as the second question presented by this appeal the query whether error was committed because the appellant was not permitted to present as a defense evidence that he was a conscientious objector. This does not constitute a valid question for submission to this Court for the reason that the Record fails to show that the appellant was not permitted to present as a defense evidence that he was not a conscientious objector.]

Argument.

I.

A Registrant Who Has Failed and Neglected to Report to the Induction Station as Ordered so to Do By His Local Board May Not Raise as a Defense Against Criminal Prosecution the Ground That His Classification Was Erroneous.

*Falbo v. United States*, 320 U. S. 549, 640 S. Ct. 346, 88 L. Ed. 305 (1944);

*Estep v. United States* (*Smith v. United States*), 327 U. S. 114, 66 S. Ct. 423, 90 L. Ed. 405 (1946).

In the *Estep* case, the Court said (pp. 115-116):

“In *Falbo v. United States*, 320 U. S. 549, we held that in a criminal prosecution under §11 of the Selective Training and Service Act of 1940 (54 Stat. 894, 50 U. S. C. App. §311) a registrant could not defend on the ground that he was wrongfully classified and was entitled to a statutory exemption, where the offense was a failure to report for induction into the armed forces or for work of national importance. We found no provision for judicial review of a registrant’s classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services. The question in these cases is whether there may be judicial review of his classification in a prosecution under §11 where he reported for induction, was finally accepted, but refused to submit to induction.”

At page 122 the Court continued:

“\* \* \* The provision making the decisions of the local boards ‘final’ means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.”

The *Falbo* case held that a protesting registrant who is ordered to report for service cannot challenge his classification when on trial for violating an order of the Board until he has exhausted his administrative remedies. In the *Estep* and *Smith* cases it was held that where the registrant has exhausted his administrative remedies including all appeals, has reported for induction and has been finally accepted, but has refused to submit to induction, he may raise the question of jurisdiction of the Local Board. This question, as pointed out in the above excerpt, is reached *only if there is no basis in fact* for the classification which it gave the registrant. In the case now before this Court there was abundant basis in fact for the Local Board and the Appeal Board to classify the appellant as they did and to refuse to classify him as he

requested. The Record is replete with such facts and statements and further reference is made to them in this brief, *supra*. This was pointed out by the District Court at the time of pronouncing judgment. [R. 66-69.] The Local Board extends to the appellant a complete opportunity to present evidence and to be heard, and they considered his evidence and heard him and took everything into consideration which was submitted to them, including the extensive evidence presented at the hearing conducted by the Department of Justice, attended by appellant, on March 20, 1945. They did not limit their inquiry to merely whether or not he was a member of any church or read any particular religious book or Bible or any other book espousing religious views or beliefs, but took into consideration everything he had to offer, as well as his conduct, his life in the past, and his general attitudes as expressed orally, in writing and by his conduct. It is difficult to conceive how a more painstaking examination and consideration of appellant's claims to a different classification could have been made by his Local Board.

The record clearly shows, however, that the District Court permitted appellant more liberality than the law allows. Appellant was allowed to offer his entire Selective Service file. [R. 47.] This included all the evidence the appellant had to offer that he was a Conscientious Objector, except possible oral reiterations of the same things from the witness stand. When Mr. Carlson, Chairman of the Local Board which classified appellant, was cross-examined on the subject of what appellant's statements

to the Board had been, the Assistant United States Attorney trying the case objected on the ground that this line of questioning was immaterial, since the only material matter was whether the Local Board had ordered the defendant (appellant) to report for induction, and whether he had failed to appear. [R. 52-53.] The Court overruled this objection, and allowed the evidence to be admitted, subject to a motion to strike. [R. 53.]

When the appellant himself was testifying, the Assistant United States Attorney again objected to a line of questions which had as their object the impeaching of the classification given by the Local Board. [R. 60-61.] Again the Court, although remarking that he thought the objector was probably right, overruled the objection, and admitted the evidence subject to the same motion to strike. [R. 61.]

At the conclusion of the trial, the Court announced:

“I have admitted evidence in the case and indicated that a ruling would be made. I will now affirm the rulings which I have heretofore made overruling the objection of the Government.” [R. 66.]

Appellant's point is not supported by the record, so it is clear, therefore, that on this ground, the District Court committed no error, and the judgment should be affirmed.



II.

The Court Below Did Not Erroneously Construe the  
Meaning of the Phrase "Religious Training and  
Belief" in Adjudging the Appellant Guilty.

To begin with, the Court below had no jurisdiction to inquire into the meaning of the term, nor to admit evidence in any way touching upon the classification of the appellant, either upon the ground (1) that the Local Board was without jurisdiction, or upon the ground (2) that its classification was erroneous, as appellant had not exhausted his administrative remedies and reported for induction as ordered by his Local Board. [R. 3, 7, 23, 29, 45-46, 56]. (App. Op. Br. p. 2.)

*Falbo v. United States, supra;*

*Estep v. United States, supra;*

*Smith v. United States, supra.*

See:

*Brief, supra, pages 13-16.*

Incidentally, this fact distinguishes this case from the *Berman* case, referred to by appellant as involving the same points of law. (App. Op. Br. p. 10.) Although the *Berman* case was decided adversely to appellant, the appellant in that case stood in a much stronger position than does appellant here. In the *Berman* case, Berman reported to the induction station as ordered by his Local Board, but refused to be inducted. Appellant here did not report for induction as ordered. Accordingly, under the holdings of the Supreme Court, appellant here is not in a position to raise the point of classification or interpretation of the term "religious training and belief."

In any event, the point has been decided by this Circuit adversely to appellant's contention, and certiorari has been denied.

*Berman v. United States*, 156 F. (2d) 377 (C. C. A. 9th 1946); cert. den. ....

That decision makes it abundantly clear that it is not the Court's function to determine what the law *ought* to be, but what it is. It is true that definitions can be found for words which vary so much from the commonly accepted connotation that the use of the word in the peculiar sense would convey nothing at all to the ordinary user of the word.

The fallacy of appellant's argument is that when Congress used the phrase "religious training and belief," it was not dealing in the realm of metaphysics and philosophy, nor attempting to render a syncretic exegesis of Kant, Carpenter, Hillel, Mill, Santayana, Dewey, James, and Einstein, but rather was taking hold of a common verbal symbol which had acquired, over a period of centuries, a pretty generally accepted and understood meaning by the public. Even if we did not have the express views of Congress to guide us, would it be reasonable to suppose that Congress, in its effort to convey to the public the law, would appropriate such a term and then intend that the term should be given the amorphous philosophical connotation suggested by the eclectic dissertation in appellant's brief? It is not rather to be supposed that when Congress used the term, it used it in the sense understood by the public to which it was speaking?

As pointed out in the Appellee's Reply Brief in the *Berman* case (pp. 43-57), however, we do not have to speculate, for Congress expressly rejected such a provision as the appellant now seeks to reach by his interpretation. Had Congress intended no limitation, it could just as easily have omitted the word "religious," as it was urged to do by some groups. Applying the well-known doctrines that words are to be deemed to have been used in their usual and ordinary sense, and that Congress is deemed to have used no superfluous words, plus the fact that Congress expressly rejected the suggestion that the law should be made to read as appellant now contends it should be interpreted, the contention of appellant must fall.

Practicality would indeed require that some such limitation be placed upon the right to claim the exemption. Appellant claims he was taught from early childhood to respect the sacredness of human life, to obey the Commandment, "Thou Shalt Not Kill," and to follow the Golden Rule. What young man hasn't? The men who composed our armed forces were not the product of families of killers, nor were they killers themselves. They were civilians, in ordinary peaceable pursuits, before the war. In fact, probably all or nearly all of them recoiled from the thought of killing a fellow human being, and felt, as appellant feels, that they could never bring themselves to kill a man. If such revulsion to war were a basis of exemption, it is probable that our government would have found it difficult or impossible to raise an army at all.

Thus, the District Court committed no error on this ground, and the judgment should be affirmed.

III.

**A New Trial Should Not Be Granted nor the Cause Remanded on the Ground That the Defendant Was Not Permitted to Present as a Defense Evidence That He Was a Conscientious Objector Who Had Submitted to All Processes on the Road to Induction Except Actual Induction Itself.**

This is not properly a question on appeal, for the record shows the statement of it, as made by appellant, to be erroneous in two particulars. First, it is not true that "defendant was not permitted to present as a defense evidence that he was a conscientious objector"; and second, it is not true that "he had submitted to all processes on the road to induction except actual induction itself."

As pointed out earlier in this Brief (page 16) the Court overruled the Government's objections to the admission of testimony and documentary evidence which were offered to prove that appellant was a conscientious objector and should have been classified as such. [R. 47, 52, 53, 60, 61, 66.] Moreover, appellant had not "submitted to all processes on the road to induction except actual induction itself," for it is undisputed—in fact it is stipulated—that *appellant did not report for induction* as ordered by his Local Board. [R. 3, 7, 23, 29, 45-46, 56.] (App. Op. Br. p. 2.)

If it be appellant's position that he had complied with all the orders of the Board and had been accepted by the military forces by reason of having submitted to a pre-induction physical examination and having been accepted preliminarily there, his position is refuted by the fact pointed out by Justice Frankfurter in his concurring



opinion in the *Estep* and *Smith* cases, at pages 138-139, as follows:

“The question raised by the facts of this case has come before the Circuit Courts of Appeals for the First, the Second, the Third, the Fourth, the Fifth, the Sixth, the Seventh and the Eighth Circuits. All, eight of them, have ruled that judicial review of a draft board classification is not available, in a criminal prosecution, even though the registrant has submitted to the pre-induction physical examination. *Sirski v. United States*, 145 F. (2d) 749 (C. C. A. 1st 1944); *United States v. Flakowicz*, 146 F. (2d) 874 (C. C. A. 2d 1945); *United States v. Estep*, 150 F. (2d) 768 (C. C. A. 3d 1945); *Smith v. United States*, 148 F. (2d) 288 (C. C. A. 4th 1945); *Koch v. United States*, 150 F. (2d) 762 (C. C. A. 4th 1945); *Fletcher v. United States*, 129 F. (2d) 262 (C. C. A. 5th 1942); *Klopp v. United States*, 148 F. (2d) 659 (C. C. A. 6th 1945); *United States v. Rinko*, 147 F. (2d) 1 (C. C. A. 8th 1945); *Gibson v. United States*, 149 F. (2d) 751 (C. C. A. 8th 1945).”

Under the present procedure, if a selectee passes the pre-induction physical examination, he may be ordered up for induction within ninety days without undergoing another one, but when he reports at the induction station he must undergo, *inter alia*, a physical inspection to determine his final acceptability for service. See Army Regulation 615-500, Section 15, issued August 10, 1944.

That a selectee is not finally found acceptable under this procedure until after he has reported for induction is demonstrated by the fact that during the period from February 1944 to June 1946, 2,695,714 registrants re-



ported for induction and 230,581 were rejected at the induction station even though they had previously received certificates of fitness upon pre-induction examination. Thus 8.6% of men reporting were rejected. These facts were called to the attention of the Supreme Court in the *Flakowicz* case, and certiorari was denied.

*United States v. Flakowicz*, 146 F. (2d) 874 (C. C. A. 2d 1945); cert. den. 325 U. S. 851, 65 S. Ct. 1086, 89 L. Ed. 1971 (1945).

See, also:

*United States v. Rinko*, 147 F. (2d) 1 (C. C. A. 7th 1945); cert. den. 325 U. S. 851, 65 S. Ct. 1086, 89 L. Ed. 1971 (1945).

Since the so-called "point" of appellant is not supported by the Record, it should be disregarded, and the judgment affirmed.

### Conclusion.

It is respectfully submitted that the judgment of conviction appealed from should be affirmed.

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No. 11113.

IN THE

**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

JACK EUGENE THOMSON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

BRIEF IN OPPOSITION TO PETITION FOR  
REHEARING.

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FILED

OCT 13 1947

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No. 11113.

IN THE

# United States Circuit Court of Appeals

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---

## BRIEF IN OPPOSITION TO PETITION FOR REHEARING.

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The Petition for Rehearing should be denied for the following reasons:

### I.

**Appellant Did Not Exhaust His Administrative Remedies and Therefore the Decision of This Court Should Not Be Disturbed.**

The opinion of this Court rendered April 30, 1947 is a complete answer to the Petition for Rehearing, except that appellant now seeks to go one step further back and to repudiate the express provisions of the law and the judicial interpretations thereof by quoting selected excerpts from statements of individual Senators during the discussions preceding an amendment to the Selective Service Law in Congress.

The section referred to in the Petition (50 U. S. C. A., App., §304a) is not applicable to selectees generally, but only to the one very special and narrow category of registrants described in the first paragraph of the section. The Petition for Rehearing neglects to quote this portion of the section. The provisions quoted expressly refer only to those registrants to whom it appears that their induction will shortly occur and who *request* to be ordered to a regularly established induction station for a pre-induction physical examination. The special nature of this section and its definite limitations are re-emphasized in the first sentence of the second paragraph (which was also omitted from the Petition) which reads, in part:

“The commanding officer of such induction station where *such* physical examination is conducted *under this provision* shall issue to the registrant a certificate . . . .”

Finally, the very sentence quoted by the appellant in his Petition again emphasizes the special nature of the procedure in the following manner:

“Those registrants who are classified 1-A at the time of *such* physical examination . . . .”

Thus it is apparent that the provisions of Section 304a are expressly limited to this very special situation, namely, where the registrant who feels that his induction will shortly occur *requests* an immediate pre-induction examination. Obviously, then, this section is not applicable in this case and hence affords no basis for disturbing the decision heretofore rendered.

Appellant's contentions in his Petition for Rehearing are not new, however. They are the same arguments

which were advanced by the appellants in *United States v. Flakowicz*, 146 F. (2d) 874 (C. C. A. 2d, 1945); cert. den. 325 U. S. 851, 65 S. Ct. 1086, 89 L. Ed. 1971 (1945), and *United States v. Rinko*, 147 F. (2d) 1 (C. C. A. 7th, 1945); cert. den. 325 U. S. 851, 65 S. Ct. 1086, 89 L. Ed. 1971 (1945), and which were rejected by the Seventh and Second Circuits, following which certiorari was denied by the Supreme Court. In both cases, as in this one, the appellants relied heavily upon *Billings v. Truesdell*, 321 U. S. 542, 64 S. Ct. 737, 88 L. Ed. 917 (1944).

Appellant again seeks to distinguish the decision of the United States Supreme Court in *Balogh v. United States*, 91 L. Ed. (Adv. Op.) 428 (1947). To avoid lengthy repetition here, reference is made to Appellee's Supplemental Brief [pp. 2-7] wherein an analysis of the holding of the *Balogh* decision is made by setting forth the issues which were before the Supreme Court, as they appear in the Government's Petition for the Writ of Certiorari.

### Conclusion.

The contentions of the appellant are therefore without merit and the Petition for Rehearing should be denied.

Respectfully submitted,

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